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CITY OF LONDON (VARIOUS POWERS) ACT, 1954

Smoke Abatement. Part II of this local Act, which received the Royal Assent on July 5, consists of one section, section 4, dealing with smoke abatement in the City of London. The provisions come into force on such date after October 1, 1955, as may be fixed by resolution of the common council, of which at least six months' notice must be given by notice published in a local newspaper circulating in the City. After that date no smoke (which is defined to include soot, ash, grit or gritty particles) may be emitted from any premises in the City and the occupier of any premises from which smoke is emitted will be liable to a fine of £10 and a daily penalty of £5. There are, however, certain defences and exceptions. The three defences are as follows :—

(i) That the emission of smoke arose from a furnace, stove or other appliance suitable for burning an authorised fuel and properly maintained and used, and an authorised fuel was in fact burnt.

(ii) That the emission of smoke arose from a furnace, stove or other appliance suitable for burning an authorised fuel and properly maintained and used, and some other fuel was in fact burnt because the authorised fuel for which the appliance was suitable was not available to the occupier and could not, with reasonable care and foresight, have been available to him at the time the smoke was emitted.

(iii) That the emission of smoke arose as a result of burning any fuel approved by the common council as suitable for the furnace, stove or other appliance in accordance with the terms and conditions of the approval. "Authorised fuel" means coke and

anthracite (but not oil), and the common council may by resolution specify other fuel, *e.g.*, oil, as authorised fuel.

The enforcement of these provisions is bound to lead to a good deal of expenditure in adapting existing methods of heating in many of the older buildings in the City. Power is given to the common council to ease the burden in such cases by excepting any premises from the operation of the section either generally or for a specific time. The common council may subsequently take away an exemption already given or grant an exemption not given originally.

The burden of complying with the obligations imposed by the section is, in the first place, put on the occupier. The owner, as such, cannot be prosecuted for allowing the emission of smoke, but he may well find that the burden of conversion falls wholly or in part on him. Subsection (3) deals with two cases, first, where an occupier, because of a restriction affecting his interest in the premises, cannot effect any conversion necessary to enable him to burn authorised fuel only and, secondly, where he considers that the owner should contribute towards the cost of conversion. In the first case, the occupier can apply to the Mayor's and City of London Court for an order to enable the execution of such works as may be necessary. In the second case, if the owner and occupier can agree to split the cost of conversion between them no difficulty arises, but what is likely to happen is that the owner will be unwilling to contribute towards the cost of conversion unless he is going to get some permanent benefit. Accordingly, it is provided that the occupier can apply to the Mayor's and City of London Court for an order directing the owner (or any other person who appears to the court to have an interest in the premises) to contribute towards the cost of conversion such an amount as appears to the court in all the circumstances of the case to be fair and reasonable. Subsection (4) provides that the common council can contribute towards the cost of conversion.

The biggest offender in the City in respect of smoke, the Crown, needless to say, is not bound by the Act.

Miscellaneous. Section 9 is a general provision dealing with the service of notices by the Corporation, and enables service to be by post. It seems a pity that a section of this nature is contained in a local Act, and surely it is time that the service of notices generally were dealt with by a public Act?

Section 21 deals with structures over or under streets and provides that the licence of the common council is required for the construction or erection of any such structure, with certain

exceptions. The objectionable part of this section is that any licence to build under or over the street is deemed to include a provision that the occupier will, at the request of the common council and at his own expense, remove or alter the structure, if necessary or desirable, in connection with the carrying out of improvements to the street. A licence granted under the section may be subject to terms and conditions which will bind successive owners and occupiers. The licence is to be treated as a local land charge for the purposes of the Land Charges Act, 1925. It is by no means clear what the effect of non-registration is. In view of the express provision that successive owners and occupiers are bound by the terms and conditions, it would seem that they are bound irrespective of registration.

LONDON COUNTY COUNCIL (GENERAL POWERS) ACT, 1954

Dustbins. Part IV of this local Act, which received the Royal Assent on July 5, deals with the provision of dustbins in London. (A note on the position outside London appears in Vol. 17, at p. 328.) In order that the subject should not be under any illusion as to what a dustbin is, section 13 defines it as "a movable receptacle for the deposit of ashes or refuse." Surely if the draftsman thought the word worthy of definition he should have completed it by adding the words "or both" at the end? One must turn to section 12 to discover that it must be properly covered.

Leaving aside the question of special local Acts, in London the position in the past has been that the sanitary authority could provide dustbins and charge a rent to the occupier, and this position is preserved by section 11. The charge for the dustbin is recoverable as part of the general rate in respect of the premises for which the dustbin was provided, but without prejudice to the rights of any person under any tenancy agreement. The result is that, apart from any agreement between the landlord and the tenant, the expense falls in the first place upon the person who pays the rates. If the landlord pays the rates, it appears that he can recover the increase by means of a corresponding increase in rent under the Rent Restrictions Acts.

Local authorities in many cases prefer to put the burden of providing a dustbin on the owner or occupier, and their power to do so is contained in section 12 of the new Act, which brings London into line with the provinces. The sanitary authority can serve a notice on the owner requiring him to provide a dustbin. The owner has a right of appeal, under the Public Health (London) Act, 1936, s. 286, to the Magistrates' Court. (In passing it should

be pointed out that this section was amended by the London County Council (General Powers) Act, 1951, which, being a local Act, is not printed among the general statutes. The original provided for an appeal to the Appeals Committee of the London County Council.) The new section provides that an owner may appeal on the ground that the house to which the notice relates is occupied by someone else and that the occupier ought to comply with the requirements of the notice. Where he wishes to appeal on this ground he must, as under the Local Government (Miscellaneous Provisions) Act, 1953, serve a notice of his appeal on the occupier and on the sanitary authority, together with a written intimation that he proposes to rely on that ground. The court will then make such order as it thinks fit.

There has been a constant struggle between landlords and local authorities, as local authorities would like to be able to saddle the cost of dustbins on the owners in all cases, but so far they have failed both in persuading Parliament to give them these powers and, in general, in persuading Magistrates' Courts to put the burden on the owner rather than the occupier.

HOUSING REPAIRS AND RENTS ACT, 1954

As was to be expected the number of problems arising under the Housing Repairs and Rents Act, 1954, is legion, and we merely mention below one or two points that may be of interest to readers.

Stamp on Agreements under section 40. Section 40 makes provision for an increase to cover the rise in the cost of services provided under pre-1939 lettings and, if the parties can agree on the amount of the increase, they may do so. In one case such an agreement was submitted to the Stamp Office for adjudication, and we are told that it was adjudged liable to *ad valorem* stamp duty as on a lease. If this view is correct it will come as a serious shock to landlords, but the Revenue's view appears to be unsound. A statutory tenancy is not a lease at all but a personal right of the statutory tenant: see *Keeves v. Dean* [1924] 1 K.B. 685. Accordingly, any agreement reached between the statutory tenant and the landlord is not an agreement in respect of a lease at all. But, even in the case of contractual tenancies, the agreement is not an agreement to pay additional rent: the obligation to pay is imposed by the Act itself and in no way depends upon an agreement. The agreement merely quantifies the additional amount to be paid. For the same reason, as the agreement does not embody any contractual obligation, it seems clear that it is not liable to bond covenant duty. This leaves two alternatives,

either the fixed duty of 6d. on an agreement under hand (or 10s., if under seal) or no duty at all. We know that there have been differing opinions expressed on which alternative is applicable and, until there is an authoritative decision, no doubt landlords will take the particular course that appeals to them: on the one hand the amount of duty would be very small but, on the other, it seems unlikely that the landlord would want to rely on a written agreement in court in very many cases.

The "Stopper" Clause. There is a marked cleavage of opinion on the method of calculating the maximum repairs increase where the landlord serves a notice under section 30 disclaiming liability for internal decorative repairs. The official view is that the ceiling is to be calculated after making the reduction of one-third of the repairs increase under section 30. The other view is that no reduction is to be made before calculating the ceiling. Section 30 provides that where a notice has been served under the section the amount of any repairs increase "recoverable by the landlord" shall be reduced by one-third. The repairs increase is the statutory amount allowed by section 23, and the repairs increase recoverable by the landlord is that amount subject to the limit imposed by section 24. Accordingly, we agree with Mr. R. E. Megarry, in his article, at p. 796, of the *Journal of Planning and Property Law* for November, that the official view is correct, although there is a respectable body of opinion taking a contrary view. Indeed, a writer in one of our contemporaries has expressed both views in consecutive issues.

Requisitioned Premises. There are a number of cases where dwelling-houses are under requisition on terms whereunder the requisitioning authority is not under responsibility for repairs, and the question arises whether the owner is entitled to an increase under the new Act. He is certainly not entitled to an increase under the new Act as such, for the premises are not "let" to the local authority, but the owner can achieve the same result in another way. Under the Compensation (Defence) Act, 1939, as amended by the Requisitioned Land and War Works Act, 1945, in the case of rent-restricted property the landlord is entitled to rental compensation, subject to a limit of the maximum rent which would have been recoverable under the Rent Restrictions Acts on the assumption that the tenant undertook to pay all usual tenant's rates and taxes and to bear the cost of the repairs and insurance and the other expenses, if any, necessary to maintain the property in a state to command that rent. In practice, the owner receives the permissible rent subject to adjustments resulting

from any notional transfer of burden as a result of his being relieved of his obligation to repair. Power was given to the tenant to disclaim his tenancy under the Landlord and Tenant (Requisitioned Land) Act, 1942, but the amount of compensation is unaffected. Section 8 (3) of this Act provides that nothing shall affect any agreement between the requisitioning authority and the landlord to carry out the repairs, and the requisitioning authority pays to the landlord such periodical sum as may be agreed for the repairs. Accordingly, it is purely a question of agreement between the landlord and the requisitioning authority and, if the parties cannot agree to an increase in the compensation payable, the landlord's remedy is to terminate his agreement to do the repairs and cast the obligation on the local authority.

GOOD RIGHT TO CONVEY

Mr. W. J. Williams has written, with regard to the reference in the article "Good Right to Convey" which appeared on p. 364, *ante*, to his book, Williams on *Title* (1948), p. 598, that footnote (h) should have been cited, and not footnote (n). He also wishes to make it clear that he is in agreement with the statements in Williams' *Vendor and Purchaser* and Emmet on *Title*, to which reference is made in that article, and that, in his opinion, p. 598 of his book, including footnotes (h) and (n), fully supports those statements and there is no conflict of opinion.

AGRICULTURAL HOLDING—TENANCY FOR 364 DAYS

In *Land Settlement Association, Ltd. v. Carr* [1944] K.B. 657, it was held that the Agricultural Holdings Act, 1923, did not apply to a periodic tenancy when the period was 364 days. Under section 2 of the Agricultural Holdings Act, 1948, a tenancy for an interest less than a yearly tenancy is treated as a yearly tenancy and brought within the Act unless the approval of the County Agricultural Executive Committee to the tenancy is obtained before the tenancy takes effect. There is a proviso to the section, whereby a tenancy of land, or a licence to occupy land, made in contemplation of the use of the land only for grazing or mowing during some specified period of the year is excluded from the section with the result that the tenant or licensee does not get security of tenure.

In *Reed v. Dawson* [1954] J.P.L. 591, L granted T the exclusive right and liberty to mow hay and depasture or graze only sheep and cattle on certain fields for a term commencing on November 1, 1950, and terminating on October 30, 1951, at a rent

of £150. On the expiration of the tenancy the tenant held over and continued to pay rent, which was accepted. The landlord claimed possession on the ground that the tenancy was within the proviso to section 2. It was held that the original grant for 364 days was for "some specified period of the year" and was thus within the proviso. The effect of the holding over depended on what was in the minds of the parties and, on the facts, they must have intended and contemplated a new tenancy for 364 days. Accordingly, the new tenancy came within the proviso and the landlord was entitled to possession.

PURCHASES IN BREACH OF TRUST: A SUGGESTED CURE

By THEODORE B. F. RUOFF, Solicitor

(*See the Precedents on p. 715*)

In modern conveyancing there are not many traps for the unwary or the ignorant and as January 1, 1926, recedes into the mists of time they will inevitably become fewer. Nevertheless, it is apparent to anyone who peruses a fair number of titles that there is one serious error into which some practitioners are especially prone to stray. This is the error of allowing a client who is a fiduciary to purchase trust property without taking any of the necessary precautions to prevent a breach of trust. Mistakes of this kind can be costly (a).

In fairness to those who thus fail it should be put on record that the fact that a breach of trust can arise in this way suggests something in the nature of a trap set by the lawmakers. For example, under a strict settlement the tenant for life has the duties and the liabilities of a trustee (b) and yet he is quite free to purchase the trust property for himself (c). Again, it is at least arguable—the writer dare not put it more strongly—that personal representatives can distribute a legal estate by way of assent or conveyance without a subsequent purchaser being concerned with the propriety of the distribution (d). (As regards out-and-out sales, the personal representative is presumably in the same position as any other fiduciary.) However, it is abundantly clear that trustees for sale and other trustees do not enjoy comparable privileges. Can it be that those responsible for the Birkenhead legislation forgot this gap in the curtain principle? Or did they consider the old rules governing fiduciaries as being entirely sacrosanct?

Be that as it may, it has long been the rule and still is today, that a trustee is absolutely prohibited from purchasing trust property from himself, or from himself and his co-trustees (e),

(a) *Cf. Pilkington v. Wood* [1953] Ch. 770.

(b) Settled Land Act, 1925, s. 107 (1).

(c) *Ibid.*, s. 68.

(d) Administration of Estates Act, 1925, s. 36 (7).

(e) *Fox v. Mackreth* (1788) 2 B.C.C. 400.

whether he uses direct or devious (f) ways of doing it. The principle was expressed by Lord Eldon L.C. in these words (g):

“The rule I take to be this, not, that a trustee cannot buy from his *cestuy que trust*, but, that he shall not buy from himself. If a trustee will so deal with his *cestuy que trust*, that the amount of the transaction shakes off the obligation that attaches upon him as trustee, then he may buy. . . . A trustee who is entrusted to sell and manage for others, undertakes in the same moment in which he becomes a trustee, not to manage for the benefit and advantage of himself. . . . It does not preclude him from bargaining, that he will no longer act as a trustee. The *cestuys que trust* may by a new contract dismiss him from that character; but even then that transaction by which they dismiss him, must according to the rules of this court be watched with infinite and the most guarded jealousy. . . .”

The trustee cannot denude himself of the character of a trustee during the subsistence of the trust. And, till something is done to put an end to the character in which he stands, he continues liable for a considerable period of time (h). Nevertheless, a purchase in breach of trust does not remain impeachable for all time and after twenty years the court has refused to upset a sale (i).

There is not the same complete prohibition against a trustee buying trust property from his beneficiary, although the mischiefs of such a purchase, it has been said, are great (k). The point of the prohibition is that by being a trustee, a person acquires knowledge that must be used, not for his benefit, but for the sole benefit of his *cestui que trust* (l). And as there is an obvious conflict between interest and duty, the trustee must be scrupulous in seeing that he takes no advantage of the confidence reposed in him (m); yet the rule which invalidates a sale to a trustee is one which is subject to some qualifications. If the trustee has purchased openly and fairly and with the concurrence of all the beneficiaries, the court will not necessarily set the transaction aside (n). Naturally, the court will examine all the circumstances and see whether the transaction is for the benefit of the beneficiaries (o).

(f) See, e.g., *Parker v. McKenna* (1875) L.R. 10 Ch. 96; *Ex p. Burnell* (1843) 7 Jur.Rep. 116.

(g) In *Ex p. Lacey* (1802) 6 Ves. 625.

(h) *Chalmer v. Bradley* (1819) 1 J. & W. 51, at p. 67.

(i) *Campbell v. Walker* (1800) 5 Ves. 678 and case there cited at p. 680a.

(k) *Per Plumer M.R. in Chalmer v. Bradley (supra)*, at p. 68.

(l) *Ex p. James* (1803) 8 Ves. 348.

(m) *Fox v. Mackreth (supra)*.

(n) *Dover v. Buck* (1865) 5 Giff. 57, at p. 63.

(o) *Campbell v. Walker (supra)*, at p. 681.

A purchase from trustees by the wife of one of them is also a perilous proceeding (*p*) but, here again, it seems that there is no absolute rule of law against such a transaction (*q*).

The unfortunate fact about purchases in breach of trust is that the blemish is hard to get rid of. Resale is not a cure, because a first and fundamental principle is that a trust follows the legal estate wherever it goes, except into the hands of a purchaser for valuable consideration without notice (*r*). Thus every volunteer, whether he has notice or not, and everyone else who has notice of the facts will be liable to have the transaction set aside (*s*), and the fact of the breach will be only too apparent as a rule. The burden of proving that a transaction was a proper one lies upon the trustee (*t*) and, presumably, upon his successors in title to the property the subject of the breach.

Any title which contains a defect of the kind described above is not void, but voidable. It is completely unmarketable unless a long time has elapsed since the breach occurred. The court can, of course, authorise a proposed transaction. But in theory a sale by trustees to one of themselves constitutes an incurable fault despite the modern machinery which allows this former impossibility to be accomplished (*u*). The court can and does inquire into past transactions, but both courage and money are needed in order to get a title that contains a past breach of trust judicially blessed. Yet the purpose of this article is to suggest how a permanent cure can be obtained more simply and cheaply than that. It is apparent from what has been said already that the court will be loth to set aside a transaction if it is a proper one, that is to say, one in which the following facts can be established:

- (1) That the trustee took no advantage of his knowledge and position.
- (2) That the consideration was an adequate one (*a*).
- (3) That all the beneficiaries, being *sui juris*, and fully acquainted with the facts, willingly consented to the sale.
- (4) That they received independent legal advice (*b*).

It is safe to say that if the last point can be proved, the trustee or his successors have gone a long way towards proving the

(*p*) Cf. *Ferraby v. Hobson* (1847) 2 Ph. 255, at p. 261.

(*q*) *Burrell v. Burrell's Trustees* [1915] S.C. 333. This subject is discussed in 13 *Conveyancer* (N.S.), pp. 248 *et seq.*

(*r*) *Att.-Gen. v. Lady Downing* (1761) 1 Wilmot 1, at p. 21.

(*s*) Cf. *Bainbridge v. Browne* (1881) 18 Ch.D. 188, at p. 197.

(*t*) *Luff v. Lord* (1864) 34 Beav. 220.

(*u*) Law of Property Act, 1925, s. 72 (3) (4).

(*a*) *Luff v. Lord* (*supra*); *Clarke v. Swaile* (1762) 2 Eden. 134

(*b*) *Luff v. Lord* (*supra*).

second and third points. The first point is scarcely susceptible of proof. However, the probabilities can be assessed. There is no substantial difference between a beneficiary giving his consent to a proposed course of action and his ratifying something already done, and therefore, when a purchase in breach of trust is discovered, the first thing to do is to trace the beneficiaries. Next, if possible, they must be induced to seek an independent professional opinion about the voidable transaction. If the advice which is given them is to the effect that the sale was a fair and proper one in every way and they are all willing to give their unequivocal consent retrospectively, that is an end of the matter, *for, if they do not wish to challenge the trustee-purchaser's title, no one else can impugn it.* That is the whole knub of the present article. It remains for them to join in executing a confirmatory conveyance in favour of the present owner (c) and it is strongly desirable that they should also prove the material recitals in the deed by a statutory declaration (d). It sometimes happens that the titles to a great many equities have to be deduced and proved before a confirmatory deed can be prepared, but in the ordinary way purchases in breach of trust come to light fairly quickly and before complications ensue and the writer knows of several cases in which the method described has been used to cure the defect.

Even after the remedy has been applied, the blemish will appear on the title for at least thirty years and will give rise to special conditions of sale, doubts, difficulties and delays. All these, although ill-founded, will be magnified if a purchaser's solicitor is either unduly nervous or needlessly fussy and time and money will be wasted. Therefore the owner should consider the advisability of applying to register his title at H.M. Land Registry. If, upon his examination of the title, the Chief Land Registrar is of opinion that although it is technically open to objection, the holding under it will not be disturbed, he is given a wide discretion to ignore the defect and he may grant the applicant an absolute title (e). If this is accomplished, the owner is immediately assured that henceforth his title is unassailable on account of the past breach of trust. Furthermore, his property becomes marketable once more because no one who deals with him will ever know about the flaw. It will lie buried unseen for ever in the archives of the building in Lincoln's Inn Fields.

(c) See precedent on p. 715, *post*.

(d) See precedent on p. 717, *post*.

(e) Land Registration Act, 1925, s. 13 (c).

VALIDATION OF CHARITABLE TRUSTS

By SPENCER G. MAURICE, Barrister-at-Law

The Charitable Trusts (Validation) Act, 1954, gives effect in a modified degree to the recommendations of the Committee on the Law and Practice of Charitable Trusts contained in that part of their report (a) in which they dealt with imperfect trust instruments. It is proposed to consider here what changes in the law the Act has effected and the history behind and reasons for those changes.

History of the Act

As is well known, charitable trusts enjoy certain privileges, such as exemption from the rule against perpetuities and from the rule that, unless the objects of a trust are clearly indicated in the trust instrument, it is void for uncertainty. In considering the question of imperfect trust instruments the Committee were particularly concerned with those cases in which a trust instrument is prepared on the basis that it will be entitled to such privileges, but the trust is in fact prevented from being a charitable trust by the inclusion of secondary objects which are not charitable, or the use, albeit in association with the word "charitable", of such words as "public" and "benevolent", viz., "charitable or public" or "charitable or benevolent". Three decisions in recent years, *Re Diplock, Wintle v. Diplock* [1941] Ch. 253 (on appeal *sub nom. Chichester Diocesan Board of Finance (Incorporated) v. Simpson* [1944] A.C. 341), *Oxford Group v. Inland Revenue Commissioners* [1949] 2 All E.R. 537 and *Ellis v. Inland Revenue Commissioners* (1949) 31 T.C. 178, prompted the question whether the task of the draftsmen of a charitable trust instrument was not so difficult as to justify amendments to the law to save for charity what was clearly intended for it.

In the *Diplock* case the testator directed his executors and trustees to apply the residue of his estate, amounting in value to more than £250,000, "for such charitable or benevolent object or objects in England" as they should, in their absolute discretion, select. The executors proceeded to build and endow a home for old people and to distribute the remainder of the residue amongst

(a) Report of the Committee on the Law and Practice relating to Charitable Trusts (Cmd. 8710), Ch. 12.

139 institutions, all of which were charitable. Subsequently, the validity of the disposition was challenged by the testator's next-of-kin, who claimed that the rules governing an intestacy applied to the residuary estate, which consequently fell to be distributed amongst them. The House of Lords held that the words "or benevolent" entitled the executors to apply the fund outside the sphere of charity and that therefore the bequest was not entitled to the privilege, enjoyed only by charities, of exemption from the rule that the objects of a trust must be precisely defined, and was accordingly void for uncertainty.

The mischief of the words "or benevolent" was generally known at the time when the testator in the *Diplock* case made his will, and the error made was one into which not many draftsmen are likely to fall. The *Oxford Group* case and the *Ellis* case, on the other hand, pointed more strongly to the need for validating legislation, because the question which arose in them came before the court for the first time. In both cases the principal objects of the trust were charitable but there were secondary objects of a non-charitable nature and the court found that their inclusion prevented the organisation concerned from being a charity. The primary object of the Oxford Group, a company registered under the Companies Acts and limited by guarantee, was expressed in its memorandum of association to be "The advancement of the Christian religion, and, in particular, by the means and in accordance with the principles of the Oxford Group Movement . . ." This primary object was charitable; but the secondary object was "The maintenance, support, development and assistance of the Oxford Group Movement in every way . . ." and the Court of Appeal held that this permitted the company to engage in purely secular activities in maintaining, supporting, developing and assisting the religious movement, so that the organisation was not in law a charity. In the *Ellis* case land was conveyed to trustees on trust to permit the erection of buildings suitable for a Roman Catholic church, chapel or mission hall or as a parish room or residence for clergy and teachers or as a Roman Catholic elementary school or for use "generally in such manner for the promotion and aiding of the work of the Roman Catholic Church in the district . . . as the trustees with the consent of the Bishop may prescribe." The Court of Appeal held that the general words quoted enlarged the scope of the trust beyond exclusively charitable purposes and accordingly that the trustees could not successfully claim that the land was vested in them for charitable purposes.

In neither the *Oxford Group* case nor the *Ellis* case, as the Committee pointed out, could the draftsman know, at the time when he prepared the trust instrument, that he was making a mistake; nor, of course, could any other draftsman engaged, at any time before the decisions in those cases, in preparing a similar instrument, and there was evidence before the Committee that, in the absence of validating legislation, a large number of trusts for the provision of churches, chapels and mission halls might be invalidated by those decisions. Those two cases illustrated a situation which the Committee considered to be one of the greatest importance, involving two problems: first, whether anything should be done to save for charity imperfect trust instruments in existence at the time when those cases were decided and, secondly, whether anything should be done to save for charity imperfect trust instruments coming into existence thereafter. (Since testators and others could not be expected to hear of these decisions at once the Committee considered that some grace should be allowed for a period immediately after the dates on which the decisions were reached and took December 31, 1950 (instead of July, 1949, when the cases were decided) as "the relevant date" for dividing the two categories of trust instruments: this "relevant" date has in the Act been replaced by December 16, 1952, the date on which the intention to introduce validating legislation was announced in the House of Commons.) The Committee answered the first problem in the affirmative and the second in the negative. As already stated, the legislature has, subject to certain modifications, accepted the Committee's recommendations. Before considering how the Act gives effect to those recommendations it will, it is thought, be useful to examine the basis for them.

The Committee, in considering the problems before them, had to bear in mind the present rights of those entitled to the funds of trusts which might prove to be invalid, and also how far, if at all, an exception should be made, in favour of charity, to the principle that every man must be presumed to know the law. They decided that, in general, this principle must continue to apply to the law of charities as in every other branch of the law, but that to some extent it was desirable to derogate from it, this derogation being justified by the absurdity of the legal situation which had been created, and which is illustrated by a comparison of the circumstances of the *Oxford Group* case with those of the *Ellis* case.

What constituted a vital distinction between those two cases was the fact that in the *Oxford Group* case there was a charitable body incorporated under the Companies Acts, whereas the charity in the

Ellis case was founded on a trust instrument. In the *Oxford Group* case, therefore, all non-charitable objects could for the future be excluded by an alteration of the memorandum of association in accordance with the procedure provided for by the Companies Act, 1948, while in the *Ellis* case the trustees had no power to vary the trusts so as to exclude those purposes which were not charitable. There was evidence before the Committee that the decisions in these two cases might affect a large number of charities which were divisible into two classes: those run by bodies incorporated as companies, and those founded on trust instruments. To the trustees of the former was available, as in the *Oxford Group* case, the procedure of the Companies Act for the alteration of objects, and, at all events, the legality and existence of a company are not affected by virtue of the fact that objects thought to be charitable turn out not to be. To the trustees of the latter—save in the rare cases where the trust instruments themselves authorised variation of the trusts—no parallel procedure was available and, as the Committee pointed out, the very existence of the trusts might be at stake: once held not to be charitable, they ceased to enjoy the exemptions accorded to charitable trusts, so that if, for example, they were in terms which lacked certainty, or they infringed the rule against perpetuities, they would be void. Consequently, in charities of the latter class, it is necessary to have regard to the claims of those who are entitled to benefit if the trusts are pronounced invalid, and to the personal liability to those who establish such claims of trustees who have expended the trust moneys, in no matter how good faith.

In matters of income tax, too, the charity carried on by a body incorporated as a company enjoyed considerable advantage over the charity which rested on a trust instrument. The former, once saved from the mischief of non-charitable objects by the alteration of the company's memorandum of association, enjoyed for the future exemption from tax. Furthermore, section 37 (1) of the Finance Act, 1950, extends that relief as respects past periods by providing that a body of persons which was established before April 6, 1950, and on that date, or such later date as the Commissioners of Inland Revenue may allow, satisfied the conditions upon which a body is entitled to be treated as established for charitable purposes only, shall be treated as if it had always satisfied those conditions. Section 37 (1), while not referring specifically to charitable bodies incorporated as companies, presupposes a power to alter the constitution of the charity which, as has been said, rarely exists in the case of charities resting on trust instruments, so that its benefit is denied to virtually all charities of that class.

That the validity of a charity should depend upon which of two equally well-recognised and popular methods has been adopted for its foundation is manifestly unreasonable, and this fact, together with the knowledge that a large number of trusts which had been regarded as valid and had been playing an important part in the voluntary movement in the country might, as a result of the *Oxford Group* and *Ellis* cases, be void, prompted the Committee to recommend legislation which should give to charities based on trust instruments relief similar to that open to those enjoying the advantages of incorporation. Since the Charitable Trusts (Validation) Act does not in all respects carry out the Committee's recommendations, in some ways going farther than they do and in others not so far—and, incidentally, avoiding some of the procedural steps which exact implementation of them would have entailed—it is not now material to consider in detail those recommendations: instead it is proposed to consider the Act, the effect of which only becomes apparent in a fairly detailed examination.

The Ambit of the Act

In the first place it is desirable to notice two expressions which are used in the Act, "imperfect trust provision" and "disposition." An "imperfect trust provision" is defined (section 1 (1)) as meaning "any provision declaring the objects for which property is to be held or applied, and so describing those objects that, consistently with the terms of the provision, the property could be used exclusively for charitable purposes, but could nevertheless be used for purposes which are not charitable." Thus, not only a trust instrument with the vice of words such as those used in the *Ellis* case, but also one with the more familiar "charitable or benevolent" of the *Diplock* case is brought within the scope of the statute. "Disposition" is used in the Act with reference to a disposition of property to be held or applied for objects declared by an imperfect trust provision. Next, it must be observed that the Act is entirely retrospective in its effect, and is thus in accord with the recommendations of the Committee. It applies only to an imperfect trust provision contained in an imperfect trust instrument ("imperfect" because it contains an imperfect trust provision) taking effect before December 16, 1952 (the date on which, as already observed, the intention to introduce legislation to validate such instruments was announced in Parliament, and the date which was substituted for the "relevant date" suggested by the Committee) (section 1 (2)). A document which invites gifts of property to be held or applied for objects declared by the document—in

other words, the ordinary form of appeal sent out by a charitable body appealing for funds—is treated as an instrument taking effect when it is first issued.

Section 2 (2) takes cognisance of the fact that, prior to December 16, 1952, property which was to be held or applied for objects declared by an imperfect trust provision may, by reason of the invalidity of its disposition for those objects, have been paid or conveyed to, or applied for the benefit of, the person entitled to it by reason of the invalidity, and provides that in such a case the Act shall not apply. In other words, where, prior to December 16, 1952, the ordinary law has taken its course the matter cannot be reopened nor, indeed, would any other course be practicable. Apart from this, however, the Act applies to all dispositions of property to be held or applied for objects declared by imperfect trust provisions within the ambit of the Act (*i.e.*, contained in imperfect trust instruments which took effect before December 16, 1952), and to all covenants to make such dispositions, where, apart from the Act, the disposition would be invalid, but would be valid if the objects were exclusively charitable (section 2 (1)). By virtue of section 3 (6) a covenant entered into before the commencement of the Act (July 30, 1954), is not enforceable by virtue of the Act unless confirmed by the covenantor after that commencement. A disposition made in accordance with such a covenant is, however, treated for the purposes of the Act as confirming the covenant and any previous disposition made in accordance with it, and this means that, where payments are made annually under a covenant, a payment made after the commencement of the Act precludes the covenantor from disclaiming liability under the covenant. For the purposes of the Act “covenant” includes any agreement, whether under seal or not, and “covenantor” is to be construed accordingly (section 1 (4)). Where more than one interest has been created in the same property, there is a separate disposition in relation to each of the interests created (section 2 (3)). Unless the disposition or covenant was, before December 16, 1952, treated as invalid (and as a result alienated from charity) (section 2 (2)), and subject to the savings for adverse claims discussed below, an imperfect trust provision within the ambit of the Act has effect in relation to such disposition or covenant (a) as respects the period before the commencement of the Act, as if the whole of the declared objects were charitable; and (b) as respects the period after the commencement, as if the provision had required the property to be held or applied for the declared objects in so far only as they authorise use for charitable purposes (section 1 (2)).

This means that as from the commencement of the Act, such declared objects as are not exclusively charitable must be considered as struck out of the instrument. It is next necessary to consider the division of dispositions into those made more than six years before December 16, 1952, and those made on or after that date.

The division of trusts into two categories, those six years or more old on "the relevant date," and those less than six years old on that date, was recommended by the Committee. As regards the first class the Committee took the view that, where a trust had been in operation for six years or more without challenge, the legislature would be entirely justified in barring completely claims by any persons entitled to the trust funds by reason of invalidity of the trust, and the effect of the Act is, with certain exceptions, to bar claims in such a case. To trusts of the second class the Committee proposed that criteria should be applied which might in some cases enable persons entitled on the failure of the trust to prosecute a successful claim. The legislature has accepted in principle the Committee's proposals, but has adopted a rather simpler procedure than that envisaged by the Committee, and has leaned rather further in favour of charity.

Saving of Adverse Claims

The combined effect of subsections (1), (2) and (3) of section 3 is that a person who, apart from the Act, would have a right to recover property comprised in a disposition within the ambit of the Act on the ground of the invalidity of that disposition is left free to assert that right if the disposition had, at December 16, 1952, been in operation for not more than six years; that is, either was contained in an instrument which took effect within six years before that date, or, though contained in an instrument which took effect before that date, was subject, down to that date, or to within six years before it, to a prior interest for which the whole of the property or the income arising from it was held or applied: but he must institute any necessary proceedings to enforce his claim within one year from the passing of the Act (July 30, 1954), or from the date when the right first accrues to him or to some person through whom he claims, whichever is the later. This time limit on the enforcement of claims is, however, subject to two exceptions. First, time will not run where the right (before or after its accrual) (a) has been concealed by the fraud of some person administering the imperfect trust provision or his agent, or (b) has been acknowledged by some such person or his agent by means of a written acknowledgment given to the person having the right or his agent

and signed by the person making it, or by means of a payment or transfer of property in respect of the right (section 3 (2)). Secondly, the right is not to be deemed to accrue to anyone so long as he is under a disability or has a future interest only (section 3 (3)). Subsections (2), (3) and (4) of section 31 of the Limitation Act, 1939, which defines the circumstances in which, for the purposes of that Act, a person is to be deemed to be under a disability or to claim through another person, apply here also (section 3 (4)). Once the time available to any person to bring proceedings to recover any property has expired without his either having recovered the property or begun proceedings to do so, not only his right of action, but also his title to the property, is extinguished. Furthermore, the Act does not extend the time for bringing any proceedings beyond the period of limitation prescribed by any other enactment (section 3 (2)).

Subsection (1) of section 3 contains an indemnity for persons administering an imperfect trust provision, and for any trustee for them or for the persons on whose behalf they administer the provision, by providing that they may, as against a person who may be able to put forward a claim to the property, deal with it as if the subsection had not been passed, unless they have express notice of a claim by him to enforce his right. Such a provision is essential, since without it trustees of an imperfect trust provision within the ambit of the Act could not safely deal with the trust property so long as there was any possibility of a claim by a person putting forward the invalidity of the disposition. The corollary to this provision is that such a person, if he is to secure to himself the maximum benefit from the invalidity of the disposition, should give the trustees notice of his claim at the earliest possible moment. Once they have express notice of a claim the trustees can no longer deal safely with the property and, if they do deal with it to the prejudice of a successful claimant, he is entitled to damages or other relief (section 3 (5)). The "other relief" referred to is presumably an order for the transfer of the property to the claimant, including its transfer from a third party (other than a bona fide purchaser for value) to whom it may have been transferred. Clearly the indemnity given to the trustees is of no application if they have fraudulently concealed the existence of his right from any person who would be entitled to put forward a claim by reason of the invalidity of the disposition: this, it is submitted, is implicit from the provision, already referred to, preserving, in case of fraud, the right of action against trustees.

Legal Proceedings

The Act does not affect any order or judgment made or given before its commencement in legal proceedings begun before December 16, 1952, or any appeal or other proceedings consequent on any such order or judgment (section 4 (2)). Subject to that exception, effect is to be given to the provisions of the Act in proceedings begun before its commencement, as well as those begun afterwards (section 4 (1)). This means that any proceedings, except those sanctioned by section 3, to set aside a disposition as invalid are automatically stayed. Where, in proceedings begun on or after December 16, 1952, any order or judgment has been made or given before the commencement of the Act which would not have been made or given thereafter, the court is required, on the application made within six months of the commencement of the Act, of a person aggrieved by the order or judgment, to set it aside in whole or in part, and may make such further order as it thinks equitable with a view to placing those concerned as nearly as may be in the position they ought to be in having regard to the Act (section 4 (3)). These provisions meet the case where an attempt has been made to forestall the protective provisions of the Act by an action brought after the intention to introduce validating legislation was announced in the House of Commons.

Taxation

From the commencement of the Act dispositions validated thereby are, of course, like any other charity, exempt from the payment of income tax. As regards the period before its commencement, the Act does not impose or increase any liability to tax or enable tax paid or borne to be reclaimed (section 4 (4)). This apparently means that the Crown (which is bound by the Act: section 6) cannot in respect of the period before July 30, 1954, claim any more tax in a case where a claim adverse to charity has been prosecuted successfully under section 3, and that the trustees cannot, in respect of that period, recover any tax paid, although the imperfect trust provision has since been validated by the Act. This provision appears to be less favourable to charities based on trust instruments than is section 37 (1) of the Finance Act, 1950, to charities administered by bodies incorporated as companies, since it seems that a charity of the latter class may, under section 37 (1), not only avoid liability for tax accrued before an alteration of its memorandum of association to exclude non-charitable objects, but also recover tax already paid; section 4 (4) of the Charitable Trusts (Validation) Act, on the other hand, merely preserves the *status quo*.

Instruments not within the Act

The Committee considered whether or not steps were desirable to validate imperfect trust instruments created after the "relevant date" and considered that it was not desirable to pass legislation validating either trusts created since the "relevant date" but in existence at the date of their report, or those coming into existence thereafter. In coming to this conclusion the Committee rejected the idea of further extending the privileges enjoyed by charitable instruments by validating mistakes in their drafting, and took account of the doctrine of certainty in testamentary dispositions, it being in their view undesirable to throw upon the court the burden of deciding, not what the testator said, but what he intended to say. At all events, a draftsman cannot now be heard to say that he is ignorant of the law contained in the *Oxford Group* case and the *Ellis* case. The legislature has accepted these views, and an imperfect trust instrument created on or after December 16, 1952, is not validated by the Act.

Conclusion

In conclusion it may be convenient to summarise the Act in so far as it concerns (1) imperfect trust provisions, (2) claimants with claims adverse to charity, *i.e.*, those who seek to set up the invalidity of such instruments and (3) the trustees of such instruments.

(1) IMPERFECT TRUST PROVISIONS

These fall into four categories, as follows:—

- (a) Those in operation before December 16, 1946 (*i.e.*, more than six years before December 16, 1952). These will generally be unassailable, but an exception exists in favour of persons under a disability or with a future interest only on December 16, 1946.
- (b) Those which came into operation between December 16, 1946, and December 16, 1952. These, though *prima facie* validated, may be assailed by a person seeking to set up their invalidity in his favour, provided that he starts proceedings within the time limited by the Act, but he cannot disturb dealings with the trust property carried out without notice of his claim.
- (c) Those which were in existence but not in operation on December 16, 1952 (*i.e.*, which, although contained in a trust instrument which took effect before that date, have come into operation since that date or have not yet come

into operation). These, though *prima facie* validated, may be assailed in the same manner as the provisions coming under (b) above.

- (d) Those created on or after December 16, 1952 (whether before or after the commencement of the Act). These are outside the ambit of the Act and accordingly are not validated.

(2) CLAIMANTS WITH CLAIMS ADVERSE TO CHARITY

A person entitled on a failure of the trusts may set up the invalidity of a disposition of property to be held for objects declared by an imperfect trust provision, provided that—

- (a) the imperfect trust provision came into operation on or after December 16, 1946, or, although it came into operation before that date, the claimant was under a disability, or had a future interest only, at that date; and
- (b) he begins proceedings to enforce his right within one year of July 30, 1954 (the commencement of the Act), or the date on which the right first accrues to him or some person through whom he claims, whichever is the later, subject to the fact that time does not run against him so long as his right is concealed by the fraud of some person administering the imperfect trust provision or his agent, or if some such person has acknowledged his right, and subject to the fact that the time limited by any other enactment for bringing proceedings is not extended.

(3) TRUSTEES

They must—

- (a) on and after July 30, 1954 (the commencement of the Act) administer the trust property for charitable purposes only, treating as deleted any provision in the trust instrument authorising application for purposes which are not charitable; and
- (b) refrain from dealing with the property subject to the imperfect trust provision if they have express notice of a claim based on its invalidity: in the absence of such notice they may safely deal with the property.

The Charitable Trusts (Validation) Act gives effect to only a small part of the recommendations of the Committee and in course of time it will become obsolete, its purpose having been fulfilled. But, limited in scope though it is, it is important as saving much

for charity and relieving trustees from what might well have been serious embarrassment. The Committee foresaw that a situation similar to that created by the *Oxford Group* case and the *Ellis* case might arise in the future, and that it might be remedied on the lines which they proposed should be followed as regards the situation created by those two decisions; and it is to be hoped that the legislature would in fact again pass validating legislation to meet any such event. In any case, the present Act, in removing one of the anomalies with which the law of charity is fraught, namely the anomaly which, as a result of the *Oxford Group* and *Ellis* cases, existed between charities based on incorporation and those based on a trust deed, is a step in the right direction—the direction of a new code of charity law.

IS YORKSHIRE RIPE?

By L. D. MACKIRDY, Solicitor

For those sufficiently interested, my article in the *Law Society's Gazette* (Vol. 50, p. 59), published a few months ago, may give some background detail of the Yorkshire registries. That article was written in the sensational style to which readers of that journal have accustomed themselves. When, however, the editor of the *Conveyancer*, at p. 337 of the present volume, suggests that Yorkshire is ripe for a takeover bid by H.M. Land Registry, it becomes necessary to explain in a manner more appropriate to a less refined journal just how some Yorkshire practitioners feel about the subject.

England is divided into three parts : Yorkshire, Registered, and the Rest. One day all will be registered, no doubt ; but why on earth should Yorkshire be first to disappear ? The answer " Well, it has three deeds registries " is as logical as " Well, it has two assize towns and quite a good cricketing record." The registries are manned by local government officials who know as much of Land Registry procedure as the average clerk to the magistrates knows of Chancery procedure. Any such knowledge may be laudable, but is purely coincidental.

The Rest, you may say, lack buildings as well as staff. The Wakefield Registry I do not know. At Northallerton (where they make Glaxo) there is at least a main line station, even though only one train in ten ever bothers to stop. There is also a market once a week, and less than a dozen solicitors in private practice. As for Beverley, my favourite registry, the building has a Georgian exterior and a Sing-Sing inside. There are two markets, a beautiful Minster and only four or five firms practising solely within the borough.

The Chief Land Registrar makes it clear, on the official forms, that the postal facilities should be used wherever possible ; and generally speaking I have found it quite unnecessary to clutter up the registry in person (and misuse the new lift). If postal facilities are adequate, why decentralise ? And if decentralisation is best for us all, why choose Wakefield ? From what I have been able to make out of Wakefield from the train—and it is not always possible to make out anything—there is nothing to suggest that it is the ideal centre for registering titles. Northallerton might be better if only the trains would stop. Beverley, as affording

facilities in its present building for registration of title, I would class as inferior to the Bloody Tower.

But why Yorkshire—why not the Rest? In Yorkshire, conveyancing under the present system is easier and more foolproof than in any other county except London, Middlesex and Surrey. Here we can lose our deeds, forget to indorse memoranda of sales off, throw the mortgage on the fire when the final instalment is paid, and attempt, in vain, to gloss over the fact that the legal estate is outstanding in someone else's client. By paying a fee and perhaps making a statutory declaration we can obtain from the Yorkshire registries a satisfactory set of title documents which will last until the next orgy of destruction, forgetfulness or folly overcomes us. In the Rest, what happens? I pause for a reply from the insurance companies specialising in indemnity policies.

The Yorkshire system does not guarantee the title, but it virtually guarantees that a deed, once registered, is not lost sight of.

I am not claiming that the system is superior to that in use in H.M. Land Registry. As a matter of fact I quite favour the extension of the compulsory system. The serious point I am trying to make is that in counties without any form of registration there is more need for change than in Yorkshire. That is why, if Yorkshire solicitors have their way, the last sand castle to give way before the rising tide of compulsory registration will be flying a flag of three white roses. The title to the last sand castle, at least, has a greater chance of being in apple-pie order in Yorkshire than in any other county.

POSITIVE COVENANTS IN CONVEYANCES OF THE FEE SIMPLE

By E. H. SCAMMELL, LL.M., Barrister-at-Law

The law relating to the enforcement of positive covenants concerning land, entered into on the occasion of a sale of the fee simple, can only be described as obscure. Moreover, it is generally assumed that when the light is finally shed, the law will be found less generous in providing remedies for the enforcement of such covenants than it now is in regard to similar covenants entered into on the occasion of a lease (a). This may explain why the long term of years is usually selected in preference to the estate in fee simple when it is sought to impose obligations of a positive nature upon either or both parties to a landed transaction (b). Whilst, however, the term of years scores heavily over the estate in fee simple so far as the certainty and flexibility of the rules governing the enforcement of accompanying positive covenants are concerned, it is undoubtedly a less attractive estate from the point of view of the grantee and the number of flats and maisonnettes which are enjoyed in fee simple is significantly increasing. In these circumstances, the question of the enforceability of positive covenants affecting enjoyment of land held in fee simple becomes of increasing importance.

THE BENEFIT OF POSITIVE COVENANTS ENTERED INTO BETWEEN FREEHOLDERS

At common law, covenants as a class can generally only be enforced by the parties to the covenant and their heirs (c). This has two aspects. In the first place it means that a covenant cannot ordinarily be enforced by a person who is not a party to the deed, and this is so even where the covenant is expressed to

(a) As to such covenants, see *Spencer's Case* (1583) 5 Co.Rep. 16a and the Law of Property Act, 1925, ss. 141 and 142.

(b) This is not to imply that the conveyance and the lease are the only occasions upon which positive covenants relating to land are entered into: see, e.g., *Smith & Snipes Hall Farm Ltd. v. River Douglas Catchment Board* [1949] 2 K.B. 500; *Pakenham's Case* (1369) Y.B. 42 Ed. III f. 3, pl. 14.

(c) It may have been otherwise with simple contracts until the decision in *Tweddle v. Atkinson* (1861) 1 B. & S. 393: see *Dutton v. Poole* (1678) 2 Lev. 210, but the principle of privity clearly existed in the case of contracts under seal: see *Carnegie v. Waugh* (1823) 2 Dowl. & Ry. K.B. 277 and the judgment of Denning L.J. in *Drive Yourself Hire Co. (London) Ltd. v. Strutt* [1953] 3 W.L.R. 1111, at pp. 1119-1122.

be for his benefit (d). Exceptions do exist, however, where a stranger is allowed to enforce a covenant and notable amongst these is the case of a covenant contained in a deed poll (e). Secondly, it means that the benefit of a covenant cannot ordinarily be assigned (f). In the case, however, of certain covenants relating to land, the common law has seen its way clear to allowing a measure of enforceability which goes outside these two self-imposed limitations. At the present time the position of such covenants is dependent partially upon statute, but to review the present state of the law it is necessary to trace the common law development and then superimpose the relevant statutory provisions.

The Position at Common Law

The developed common-law rules concerning covenants relating to land are largely based upon the old and nice learning on warranties, modified here and there by the seemingly unconscious application of the jurisprudence of easements. The old warranty was the predecessor of the modern covenants for title. Thus, if A conveyed an estate in land to B with warranty, this imposed an obligation upon A to defend his title to make the grant, if called upon to do so, and, if his defence should fail, to provide other land of equal value (g). From the earliest times, the burden and benefit of such a warranty devolved respectively upon the heir of A and the heir of B (h). Further, at the time of Bracton, it had become settled that not only B's heir, but also his assign, could, subject to certain conditions, enforce the warranty (i). Originally, however, B's assign could only enforce the warranty if he could show, first, that the warranty had made express reference to assigns; and secondly, that B's heirs had failed (j). The nature of these conditions lends considerable force to the suggestion of Bracton that an assign was allowed to sue because he was a *quasi*-heir (j). During the continuance of the original grantee's heirs, the second of the above rules meant that they alone could enforce their ancestor's warranty even though the estate was not in their hands

(d) *Gilbey v. Copley* (1684) 3 Lev. 140; *Chesterfield & Midland Silkstone Colliery Co. Ltd. v. Hawkins* (1865) 3 H. & C. 677.

(e) *Cooker v. Child* (1673) 2 Lev. 74; *Chelsea and Walham Green Building Society v. Armstrong* [1951] Ch. 853.

(f) See Holdsworth, *History of English Law*, Vol. VII, pp. 531 *et seq.*

(g) See Pollock & Maitland, *History of English Law*, Vol. II, pp. 659-660.

(h) This was the position when Glanvil wrote just over a century after the Conquest—*Lib. VII. c. 2*. At the time of Bracton, however, A's heir would only be bound by A's warranty to the extent of any property devolving upon him—*De Legibus Angliae*, f. 61a.

(i) For an early case, cited by Holdsworth, *History of English Law*, Vol. III, p 161, see Bracton's *Note Book*, Case 804.

(j) Bracton, *De Legibus Angliae*, f. 17b. Cf. Holmes, *The Common Law*, pp. 373-374.

but in the hands of an assign, thus carrying to its logical conclusion the theory of succession as at the root of enforceability. Only in default of such heirs could the assign step in as a *quasi*-heir. This attitude towards the assign is important because it emphasises that his cause of action was allowed, not because the warranty had been expressly given for his benefit, but because he was the *successor* to the original grantee in the fullest sense of that word. The requirement that assigns should be mentioned in the original grant was simply to ensure that the warrantor's consent had been obtained to the widening of the class of successors. The words "and his assigns" were, in fact, words of limitation and not words of purchase. It follows from this theory of succession that only assigns who had the same estate in the land as the original grantee could obtain the benefit of the warranty. Shortly after the passing of the statute *Quia Emptores* in 1290, an assign was held entitled to vouch the original grantor to warranty without proof that the warrantor's heirs had failed (*k*), but the theory of succession remained to lay the foundation of the modern doctrine of privity of estate.

As Wendell Holmes in his celebrated book points out (*l*), it is not difficult to see why the law of covenants concerning freehold land was largely modelled upon the old law of warranty; for a warranty was a promise under seal and a promise under seal was a covenant. It is not, therefore, surprising that the rules relating to the passing of the benefit of a warranty outlined above are reflected in the conditions subject to which the benefit of a covenant entered into by one freeholder in favour of another is allowed to pass at common law to a third party. These conditions are not always unattended with doubt, but seem to be as follows.

1. The covenant must have a distinct connection with land, for otherwise it will bear no analogy to the old warranty and will have no claim to qualify for special treatment.

In the much discussed case of *Pakenham* (1369) (*m*), counsel for the defendants described such a covenant as one in which "the acquittance falls on the land, and not on the person." In modern parlance, the covenant must "touch and concern" the land, that is, it must either affect the land as regards the mode of occupation or be such as *per se*, and not merely from collateral circumstances, affects the value of the land (*n*). Examples of covenants which

(*k*) Bracton, *De Legibus Angliae*, f. 17b.

(*l*) *The Common Law*, at p. 378.

(*m*) Y.B. 42 Ed. III, f. 3, pl. 14.

(*n*) See *Smith & Snipes Hall Farm Ltd. v. River Douglas Catchment Board* [1949] 2 K.B. 500, *per* Tucker L.J. at p. 506; *Austerberry v. Oldham Corporation* (1885) 29 Ch.D. 750; *Shayler v. Woolf* [1946] Ch. 320.

have been held to satisfy this description are : a covenant to supply pure water through a pipe line (o); a covenant to maintain a sea wall (p); a covenant to make good and maintain the banks of a river (q), and the various covenants for title which may now be implied under the Law of Property Act, 1925 (r).

2. The covenant must relate to some specific land by reference to which its transmission and devolution can be traced (s).

It seems, however, that the judicial attitude towards this requirement is liberal and is dependent upon the selected limits of the principle *id certum est quod certum reddi potest*. In *Smith & Snipes Hall Farm, Ltd. v. River Douglas Catchment Board* (t), the deed of covenant contained no reference to the land to be affected but extrinsic evidence was admitted to show what land was owned by the covenantee at the time of the deed and the covenant was regarded as applying to that land. It is strange that no reference was made to this decision on this point in *Newton Abbot Co-operative Society, Ltd. v. Williamson and Treadgold, Ltd.* (u) which concerned a restrictive covenant, but a comparison of the two cases suggests that equity affords rather less scope to the maxim *id certum est quod certum reddi potest* in identifying the land affected by a negative covenant than does the common law in relation to a positive covenant.

3. Subject to established exceptions (e.g., a covenant contained in a deed poll (v)), the covenant must have been entered into with the owner of the legal estate in the land which is to be benefited.

Coke twice states the necessity for this requirement (w) and there is some judicial authority for it (x). In *Horne's Case* (x), Markham J. said : " In a writ of covenant one must be privy to the covenant if he would have a writ of covenant or aid by covenant. But peradventure, if the covenant had been made with the lord of the manor, *who had inheritance in the manor . . .* it would be otherwise." More direct is the decision of Chief Justice Kenyon in *Webb v. Russell* (y). Here, A granted a lease to B for ninety-nine

(o) *Sharp v. Waterhouse* (1857) 7 E. & B. 816; *Shayler v. Woolf*, *supra*.

(p) *Moorland v. Cook* (1868) L.R. 6 Eq. 252; *Lyle v. Smith* [1919] 2 Ir.R. 58.

(q) *Smith & Snipes Hall Farm Ltd. v. River Douglas Catchment Board*, *supra*.

(r) For cases, see Holdsworth, *History of English Law*, Vol. III, p. 163.

(s) *Smith & Snipes Hall Farm Ltd. v. River Douglas Catchment Board*, *supra*.

(t) *Supra*.

// (u) [1952] 1 All E.R. 279.

(v) See *Chelsea and Walham Building Society v. Armstrong* [1951] Ch. 853.

(w) Co.Litt. 385a (x); 5 Co.Rep. f. 18a.

(x) *Horne's Case* (1401) Y.B. 2 Hen. IV, f. 6, pl. 25; *Webb v. Russell* (1789) 3 Term Rep. 393.

(y) (1789) 3 Term Rep. 393.

years and B assigned the whole term to C by way of legal mortgage. B's interest, the legal date for redemption having passed, became a mere equity of redemption. C granted a sub-lease to D and D covenanted with B, who was a party to the lease, (*inter alia*) to repair the subdemised premises. Later, the original term of ninety-nine years and the reversion in fee simple expectant thereon became vested in X and X sought to enforce D's covenant. The action failed on two grounds: first, because the reversion expectant upon the sub-lease had, as a result of the merger, ceased to exist and there was therefore no privity of estate between the sublessee and the plaintiff; secondly, and more significantly, because the covenant was not entered into with the reversioner but with the owner of a mere equity of redemption, so that although for the benefit of the reversioner's estate, the covenant could not be enforced by his assign. This was, of course, a case turning upon the relationship of landlord and tenant, but so far as the second point was concerned, the decision seems to have been in general terms.

The importance of this requirement, assuming it to be well-founded, is considerable since it cuts much deeper than the principle of privity of contract in that, even if the estate owner whose land is to be benefited is expressly made a party to the deed of covenant, as in the case of *Webb v. Russell* itself, his *successors* will be unable to enforce it notwithstanding that the principle of privity is initially satisfied. This may limit the operation of section 56 of the Law of Property Act, 1925, dealt with below.

4. It seems that the person seeking to enforce the covenant must have the same estate in the land as the original covenantee.

There has not been sufficient clear-cut authority to make it certain that this is the common law requirement, and difficulty is created by the fact that many of the older cases on covenants were reasoned on the analogy of easements (z), and it is well known that the benefit of easements is regarded as attaching to the physical land and not merely to the estate in the land so that, for example, an adverse possessor or trespasser may enforce an easement formerly enjoyed with the land. Further, the difficulty is enhanced by the use of popular language to describe the passing of the benefit of covenants. Thus, to speak of covenants as running with the land may be more attractive than describing them as running with the estate in the land, but such modes of expression may eventually

(z) See especially the judgments in *Pakenham's Case*, *supra*.

lead to the adoption of wider interpretations than are justified (a). The only modern decision turning upon the matter seems to be *Westhoughton U. D. C. v. Wigan Coal Co.* (b). In this case, a lessee for a term of thirty years sought to enforce a covenant entered into with his freeholders "and their assigns." The actual decision went upon other grounds but the judgments contain references to the problem of a lessee enforcing a covenant. Swinfen Eady M.R. said (c): "In cases, however, not arising between landlord and tenant I am of opinion that a lessee (who is not an express assignee of the benefit of the covenant) is not an 'assign' of an owner in fee for the purpose of obtaining damages for breach of a covenant entered into with such owner in fee, his heirs and assigns." Duke L.J., however, was less inclined to exclude a lessee from the benefit of a covenant expressed in those terms though he found it unnecessary to express a concluded opinion. The arguments and judgments both seem to have confined their attention to the question of the running *as a matter of construction* of the benefit of the covenant in favour of the lessee without considering the much more fundamental issue whether in point of law the covenant *could* so run even if expressed to do so. It is submitted that here, as elsewhere, the analogy of the old warranty should be taken with its rigorous conception of privity of estate (d) rather than the analogy of the easement (whose rules of enforceability in this respect do not bear technical scrutiny) so that only a person who has the same estate in the land as the original covenantee can enforce the covenant.

5. The benefit of a covenant being something which *prima facie* enures only in favour of the covenantee and his heirs, it was essential at common law that the intention for it to have a wider operation, with a correspondingly increased burden upon the covenantor, should clearly appear from the covenant.

In the similar case of the warranty, it has been seen that express mention of assigns was required, but in the case of covenants, the common law, no doubt acting under the influence of the law of easements, was not so formal and it seems that provided a covenant, taken as a whole, evinces an intention that the benefit shall enure in favour of successors, that will be taken as sufficient (e). But

(a) Section 80 (2) and (3) of the Law of Property Act, 1925, uses the expression "running with the land," but gives a technical meaning to the expression in subsection (4).

(b) [1919] 1 Ch. 159.

(c) At p. 171.

(d) See *Chudleigh's Case* (1595) 1 Co.Rep. 120a, at 122b; *sub nom. Dillon v. Fraine*, Popham 70.

(e) See *Pakenham's Case*, *supra*; Co.Lit. 385a (x); *Lougher v. Williams* (1685) 2 Lev. 992.

whilst the common law was not regardful of the precise way in which this intention was manifested, the four rules already considered show that it *was* mindful concerning the permitted limits of a covenant's wider operation, so that no amount of intention would operate to widen beyond these permitted limits the class of persons who might benefit. This is the point which seems to have been overlooked in the arguments and judgments in the case of *Westhoughton U. D. C. v. Wigan Coal Co.* referred to above.

It cannot be denied that some authority may exist tending to show that strict compliance with the fourth and fifth of the above rules has not always been required to enable the benefit of a covenant to pass to successors at common law. The uncertainty is caused by the difficulty in assessing, from the relatively small number of decisions, the extent of the influence which the law of easements, with its much looser (and often technically indefensible) rules, has had on this branch of the law of covenants. ~~X~~What is certain, however, is that if a covenant satisfies all the requirements, then a successor in title to the original covenantee who takes the land for the benefit of which the covenant was entered into can enforce it at common law. ~~X~~One final point may be mentioned. From their nature, neither a warranty nor an easement could be granted by anyone other than the owner of an estate in land or someone on his behalf. This limitation does not apply to a covenant which may be made to run with an estate in the land although the covenantor be not himself an estate owner (f).

Statutory Modifications

Having thus considered the passing of the benefit of positive covenants at common law, attention may be turned to the effect of certain statutory provisions now contained in the Law of Property Act, 1925. The sections which bear generally upon the passing of the benefit of a freeholder's covenants are sections 56, 78, 80 and 136.

Section 136 of the Law of Property Act, 1925. As is well known, section 136 of the Law of Property Act, 1925, repeats section 25 (6) of the Judicature Act, 1873, which made possible, upon certain conditions being satisfied, a legal assignment of a chose in action. Although not commonly instanced as a chose in action, there seems little doubt that the benefit of a covenant relating to land falls within that category (g). Accordingly, it would seem that provided it can be shown that equity would formerly have lent

(f) *Smith & Snipes Hall Farm, Ltd. v. River Douglas Catchment Board*, *supra*; *Pakenham's Case*, *supra*.

(g) See H. W. Elphinstone, "What is a Chose in Action?," 9 L.Q.R. 311.

its assistance to an assignment of the benefit of such a covenant (h), then the benefit may now be assigned at law upon compliance with the statutory conditions. In *Manchester Brewery Co. v. Coombs* (i), Farwell J. held that the benefit of a restrictive covenant contained in a lease of an hotel that all beer should be purchased from the lessor was assignable. In *Shayler v. Woolf* (j), the benefit of a positive covenant to supply pure water, with a provision for arbitration in case of dispute, was held assignable. Further, in *Westhoughton U. D. C. v. Wigan Coal Co.* (k), Swinfen Eady M.R. clearly implied that the benefit of a covenant to reinstate property damaged by the covenantor's mining operations could be expressly assigned. It seems, therefore, that section 136 of the Law of Property Act, 1925, may apply to the assignment of the benefit of a positive covenant relating to land where the covenant is not merely personal to the covenantee. In these circumstances, it is always advisable, where it is desired to pass the benefit of a positive covenant to successors, to make an express assignment and for either party to follow it up with notice in writing served upon the covenantor as required by section 136 of the Law of Property Act. This raises the question whether in a conveyance not *expressly* assigning the benefit of a covenant the general words implied by the Law of Property Act, 1925, s. 62, could be regarded as extending to the benefit of covenants and as satisfying the requirement of section 136 for an "assignment by writing under the hand of the assignor. . . ." Section 62 provides that a conveyance of land "shall be deemed to include . . . all . . . liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land . . ." A number of questions, too alien to the present theme for further consideration, are raised, but it is not entirely inconceivable that section 62 may operate to satisfy the first part of section 136, leaving it necessary for the grantee only to give notice of the assignment to the covenantor—a matter which can apparently be attended to at any time no matter how remote.

Sections 78 (1) and 80 (3) of the Law of Property Act, 1925. Section 78 (1) of the Law of Property Act, 1925, provides as follows : "A covenant relating to any land of the covenantee shall be deemed to be made with the covenantee and his successors in title and the persons deriving title under him or them, and shall have effect as if such successors and other persons were expressed."

(h) See *Torkington v. Magee* [1902] 2 K.B. 427; *King v. Victoria Union Insurance Co.* [1896] A.C. 250.

(i) [1901] 2 Ch. 608.

(j) [1946] Ch. 320.

(k) [1919] 1 Ch. 159.

This provision was the subject of attention in *Smith & Snipes Hall Farm, Ltd. v. River Douglas Catchment Board* (1). In this case the catchment board in 1938 covenanted for valuable consideration with the owner in fee simple of certain land adjoining the Eller Brook river and known as "Low Meadows" to make good and maintain for all time the banks of the river. The covenant made no reference to assigns or successors in title of the covenantee. Some two years afterwards the covenantee conveyed Low Meadows to Smith, the first plaintiff, and expressly assigned to him the benefit of the covenant. In 1944, Snipes Hall Farm, Ltd., the second plaintiffs, took a yearly tenancy of Low Meadows under an oral agreement. In 1946, the Eller Brook river burst its banks as a result, it was found, of the defendant's failure to carry out the terms of the covenant. Each plaintiff claimed damages for breach of covenant. There were several defences raised which went mainly to the question whether, in the circumstances, the covenant was one which was capable of "running with the land." But it is rather surprising to discover from the judgment of Somervell L.J. that no argument was directed towards the question whether the second plaintiffs, being mere lessees, were not in a different position from the first plaintiff who admittedly had the same estate in the land as the original covenantee. This is the more curious since it further appears from the judgment of Denning L.J. (m) that, "This action is brought by a tenant of the fields against the board to recover the value of the crops he has lost. The present owner joins in the action, claiming his loss of rent, but the substantial claim is by the tenant." Because of the apparent absence of argument on the point, the decision cannot be regarded as of great value so far as it holds that the lessee could enforce the covenant, although Denning L.J. seems to have regarded the point as in issue when he said (n), "The damage has been suffered partly by the man who purchased the land, but principally by the tenants, and the question is whether they can sue on the contract." With regard to the claim of the first plaintiff, who was the owner in fee simple and successor in title to the original covenantee, once it had been established that the covenant was one which could and was intended to "run with the land," his success was assured at common law. Moreover, it would seem to have been doubly assured by the fact that the benefit of the covenant had been expressly assigned, though this does not appear to have been relied upon. In these circumstances, and since the argument did

(1) [1949] 2 K.B. 500.

(m) At p. 513.

(n) At p. 514.

not raise any distinction between the first plaintiff as owner in fee simple and the second plaintiffs as mere lessees, Tucker and Somervell L.JJ. were content to allow judgment to go in favour of both plaintiffs. Denning L.J. alone expressly dealt with the point of substance involved in the second plaintiffs' claim, which was whether a plaintiff, not having the same estate in the land as the original covenantee, could enforce the covenant. His conclusion was that, although privity of estate was required at common law, this requirement has been dispensed with by section 78 (1) of the Law of Property Act (o).

— This raises the question of the true scope and effect of section 78. The view generally held before *Smith's* case was that the section did not have any greater substantive effect than to imply certain words into express covenants and to require such words to be construed as if expressly contained in the covenants. This view is supportable by two lines of argument. In the first place, the words now to be implied were formerly usually expressly inserted into covenants concerning land so as to make it quite clear that they were intended to enure for the benefit of the covenantee's successors in title and so satisfy the common-law requirement on this point. It might therefore be argued that the object of section 78, as with many other sections of the Law of Property Act, was simply to shorten conveyances (p). Thus, it has been held that section 62 of the Act, which implies general words into conveyances, does not give such words any special statutory force (q). In support, section 78 (1) itself provides that a covenant to which the provision applies "shall have effect as if successors and other persons were expressed." Moreover, the words to be implied by section 78 (1) are such as were commonly found in the precedent books dealing with such covenants (r)—a remarkable coincidence for a provision of which it is alleged that it brings about a radical change in the law. Secondly, and by way of *reductio ad absurdum*, the construction contended for by Denning L.J. would have startling results when applied, *mutatis mutandis*, to section 79 (1), the next succeeding section. This section, using very similar language to that used by section 78 (1), provides that, "A covenant relating to any land of the covenantor or capable of being bound by him, shall, unless a contrary intention is expressed be deemed to be made by the covenantor on behalf of himself, his successors

(o) Tucker L.J. also referred to section 78 but the bare reference leaves it uncertain whether his Lordship regarded the provision as effecting a change of substance or merely of form.

(p) And see the Law of Property Act, 1925, s. 80 (3).

(q) *Bartlett v. Tottenham* [1932] 1 Ch. 114.

(r) See Davidson's *Precedents*, Vol. I (4th ed., 1874), p. 200.

in title and the persons deriving title under him or them, and, subject as aforesaid, shall have effect as if such successors and other persons were expressed." If the effect of section 78 (1) is to enable the benefit of a covenant to run in favour of all the persons therein mentioned, the effect of section 79 (1) must be to enable the burden of a covenant to run against a similar class of persons as therein mentioned—a far-reaching result for such an ambiguous statutory provision. For these reasons it is submitted that section 78 (1) must be confined in its operation to implying words into covenants and requiring such words to be construed as if expressed. This will leave the common law requirement of privity of estate untouched except in so far as it may be modified by section 56 of the Law of Property Act to which attention will now be turned.

✓ **Section 56 (1) of the Law of Property Act, 1925.** The relevant parts of this provision are as follows: "A person may take . . . the benefit of any . . . covenant or agreement over or respecting land . . . although he may not be named as a party to the conveyance or other instrument."

The precise meaning of this provision is obscure but the decided cases would seem to have settled two general principles. In the first place, it seems that the only persons who can claim directly under the provision (as opposed to claiming as successors to another) are persons who are in existence and ascertained at the time the covenant is entered into. In all but one of the cases in which a direct claim under section 56 has been allowed, the plaintiffs have satisfied this requirement (s), whilst in those cases where the plaintiffs have been successful although not in existence and ascertained at the time of the covenant, their claims have been allowed on the basis of their being common law successors to persons who were so defined (t). The exception occurs in the judgment of Denning L.J. in *Smith's* case, referred to above. In this case, the plaintiff company took their lease some years after the covenant which they sought to enforce had been entered into so that they cannot be said to have been in existence and ascertained at the time of the covenant. Denning L.J. nevertheless expressed the opinion that the lessee company could sue directly under section 56, being parties for the benefit of whom the

(s) See *Drive Yourself Hire Co. (London), Ltd. v. Strutt* [1953] 3 W.L.R. 1111; *Stromdale & Ball, Ltd. v. Burden* [1952] 1 All E.R. 59; *Chelsea and Walham Green Building Society v. Armstrong* [1951] Ch. 853, per Vaisey J.; *Dyson v. Forster* [1909] A.C. 98.

(t) See *Dyson v. Forster*, *supra*; *Re Ecclesiastical Commissioners for England's Conveyance* [1936] Ch. 430; *White v. Bijou Mansions, Ltd.* [1938] Ch. 351.

covenant had been entered into. Weighty though this opinion would ordinarily be, it is submitted that its force is reduced by the following considerations. First, none of the earlier authorities was referred to and, as a result, it was perhaps not apparent that the opinion represented a distinct advance on what had gone before. Had the lessee company been in enjoyment at the time the covenant was entered into, then provided they could show they were within its benefit, they could have enforced the covenant as original covenantees under section 56 (1) in conformity with the above-cited authorities. The fact that the company only became lessees *after* the covenant had been entered into was highly significant, yet seems to have gone unnoticed. Secondly, neither of the other learned judges expressed any opinion on the applicability of section 56 to the plaintiff company. It is submitted that the construction contended for at the outset, and with which the weight of authority is in accord, is consistent with the wording of section 56 (1) which seems to require that, though not in fact a party, a plaintiff must have been able to be such—"although he may not be named as a party."

The second principle to be derived from the cases seems to be that once it is established that a person is within the purview of a covenant then, although not a party, he is regarded as an actual covenantee. Thus, in *Re Ecclesiastical Commissioners for England's Conveyance* (u), a freeholder, X, who was not a party to a deed reserving certain restrictive covenants, was found as a matter of construction to be one of the persons intended to benefit from the deed and the question was whether X's successors in title could claim the benefit. It was held by Luxmoore J. that, although X was not a party to the deed, he was a covenantee and that the obstacle of his not being a party was overcome by section 56 (1) so that both he and his successors could enforce the covenants. This ruling, that a person intended to benefit from a covenant, although not a party, is a covenantee, is of vital importance since with positive covenants it is a requirement of enforceability by successors that there should have been an original covenantee who held the legal estate.

An example may be used to illustrate the application and summarise the effect of the above two principles. If A sells Blackacre to B in fee simple and takes a covenant from B to build a boundary wall for the benefit of C, an adjoining owner (not a party to the conveyance), then since C is an ascertained person he will be able to enforce the covenant directly under section

(u) [1936] Ch. 430.

56 (1) (v). Further, if C conveys the fee simple to D, D will be able to enforce the covenant—not directly under section 56 (1) since he was not an ascertained person at the time of the covenant, but at common law. D claims as successor to C, but section 56 (1) is a vital link in the claim, since it is only by virtue of this provision that C is deemed to be an original covenantee so that the common law requirement that the covenant must have been entered into with the owner of the legal estate in the land to be benefited is satisfied (w). But if C merely grants a lease to D *after* the above covenant has been entered into (as in *Smith's* case) then D should not be able to enforce the covenant; not under section 56 (1) because he was not an ascertained person at the time the covenant was entered into and so could not possibly have been a party, and not at common law because this is a positive covenant and he does not have the same estate in the land as the original covenantee, C. It may, however, be added, somewhat irrelevantly, that there seems no reason why C should not expressly assign the benefit of the covenant to D so as to render it enforceable by him even though he be a mere lessee (x).

The above discussion on the running of the benefit of positive covenants has not, of course, taken account of certain specific covenants which are statutorily given wider than ordinary scope, such as the statutory acknowledgment (y) and implied covenants for title (z). Moreover, it has assumed throughout that a covenant operates only as such. Cases are not wanting in the reports where a greater measure of enforceability has been accorded to a covenant on the ground that when properly construed, it takes effect as an easement (a) or rentcharge (b), and since 1925, a covenant framed in the form of a condition (thus creating a right of re-entry) may be reserved in favour of any third party and enjoyed as such, though the interest in such a case would be merely equitable (c).

THE BURDEN OF POSITIVE COVENANTS BETWEEN FREEHOLDERS

It is a striking feature of the history of positive covenants entered into between freeholders that it was not until 1935 in the

(v) See *Stromdale & Ball, Ltd. v. Burden*, *supra*; *Dyson v. Forster*, *supra*.

(w) See *Re Ecclesiastical Commissioners for England's Conveyance*, *supra*.

(x) See *Newton Abbot Co-operative Society, Ltd. v. Williamson and Treadgold, Ltd.* [1952] 1 All E.R. 279, which, however, concerned a restrictive covenant.

(y) Law of Property Act, 1925, s. 64 (3).

(z) Law of Property Act, 1925, s. 76 (6).

(a) See, e.g., *Holms v. Seller* (1692) 3 Lev. 305—a covenant that the covenantee should have the use of a way construed as a grant of an easement of way.

(b) See *Moorland v. Cook* (1868) L.R. 6 Eq. 252, as interpreted in *Austerberry v. Oldham Corporation* (1885) 29 Ch.D. 750.

(c) Law of Property Act, 1925, s. 4 (1), (2) and (3). On this matter, see S. M. Tolson, "Land without Earth," (1950) 14 *The Conveyancer*, pp. 353-357.

case of *E. & G. C., Ltd. v. Bate* (d), that the question whether, at common law, the burden of such a covenant could bind successors in title to the covenantor was finally settled in the negative. The explanation for this centuries-old legal vacuum is probably the practical one that an indirect remedy was no doubt available in most cases through the use of the indemnity. A covenant relating to land would always bind the covenantor and his estate after his death independently of whether he retained the "servient" land or not. X It was therefore common practice for the covenantor, where the covenant adversely affected land (in the factual sense), to require from any grantee of the "servient" land a covenant of indemnity; and in successive alienations, this indemnity would be repeated so that indirectly the current holder of the land would be the person upon whom the burden of the covenant would fall. It is conceivable that had the common law been compelled to decide the question in the fourteenth or fifteenth century, it would have decided differently, for it might well have used the analogy, not of the personal warranty (e), but of the warranty by which particular land alone was bound (f). Moreover, the theory of succession used by Bracton to explain the passing of the benefit of a covenant to assigns might equally well have been applied to the passing of the burden in those cases where the burden factually attached to land, and, indeed, Bracton himself expresses the view "*quia res cum onere transit ad quemcumque*" (g) and Fleta gives a similar opinion (h). Whilst, however, it would perhaps have been an easy matter for the early common law to have regarded the burden of certain types of positive covenant as running with the estate in the servient land, the situation was very different by the nineteenth century. By this time, the legal interests which could exist in land had become stereotyped (i) and to have recognised the possibility of the burden of a positive covenant attaching to a freehold estate in land would have opened the way to a plethora of new legal interests binding, if not upon the land as in the case of easements, at any rate upon the estate in the land, and the number and variety of such interests would have been limited only by the limits of the draftsman's ingenuity. In *Moorland v. Cook* (j), it does seem, indeed, as if Lord Romilly M.R., sitting in a court of equity, went perilously near to extending the principle

(d) (1935) L.J. Newspaper 203.

(e) See Y.B. 22 & 23 Ed. I, 516.

(f) Y.B. 20 Ed. I, 360; Bracton, *De Legibus Angliae*, ff. 282, 282b.

(g) *De Legibus Angliae*, ff. 282, 282b.

(h) *Lib.* VI, c. 23 s. 17. Cf. Holmes, *The Common Law*, p. 395.

(i) See *Keppel v. Bailey* (1835) 2 My. & K. 517.

(j) (1868) L.R. 6 Eq. 252.

in *Tulk v. Moxhay* (k) to positive covenants, but his decision has been explained in *Austerberry v. Oldham Corporation* (l) on the basis that the obligation of the covenant bound successors only in its true character as a rentcharge. In the latter case, Fry and Lindley L.JJ. gave it as their opinion that the burden of a positive covenant could not bind successors in title to the covenantor, and this opinion was expressly adopted in *E. & G. C., Ltd. v. Bate*, and underlies the decision in *Cator v. Newton* (m).

Paradoxically, however, no sooner has the position at common law become settled, than it has been "tossed as upon the sea" by certain implications of the decision in *Smith & Snipes Hall Farm, Ltd. v. River Douglas Catchment Board* bearing upon the true construction of section 79 (1) of the Law of Property Act, 1925. It has been seen above that, in the absence of argument, it was assumed by Tucker and Denning L.JJ. in this case that section 78 (1) of the Law of Property Act had statutory force over and above the mere implication of certain words into a covenant so as to extend the benefit of any covenant relating to land to all the persons mentioned in the subsection. If this view of the effect of section 78 (1) is correct, then, by parity of reasoning, section 79 (1) must similarly be regarded as extending the burden of any covenant relating to land to all the persons therein mentioned. The result would be that to a very considerable extent (though not to the same extent as in the case of appurtenant incorporeal hereditaments which are binding upon such persons as adverse possessors) the burden of a positive covenant could be made to "run with the land" in the hands of "successors in title [to the original covenantor] and the persons deriving title under him or them." It would necessarily follow that a new class of legal interests in land would have been statutorily created which would not be so widely enforceable as common law interests in land, but which would be of a much more fluid character than any corresponding class of common-law interests (such as easements). Thus, except in the case of the easement of fence (n), the common-law rule relating to easements is that the servient owner is under no duty to maintain the servient tenement even though, in the absence of such maintenance, the easement must eventually be lost, e.g., in the case of an easement of support (o); but a positive covenant, by its very nature, imposes positive obligations. For the reasons

(k) (1848) 2 Ph. 774.

(l) (1885) 29 Ch.D. 750.

(m) [1940] 1 K.B. 415.

(n) See *Lawrence v. Jenkins* (1873) L.R. 8 Q.B. 274; *Star v. Rookesby* (1711) 1 Salk. 335, 336.

(o) See *Jones v. Pritchard* [1908] 1 Ch. 630, per Parker J., at p. 637; *Sack v. Jones* [1925] Ch. 235.

considered earlier, it is submitted that section 79 (1) of the Law of Property Act, 1925, cannot be regarded as having brought about such a momentous change in the law. In neither *E. & G. C., Ltd. v. Bate* nor *Cator v. Newton* was section 79 (1) referred to, presumably on the ground that it was considered irrelevant. Further, to impute to the legislature an intention in section 79 (1) to create a new class of legal interests in land in the form of positive covenants is hardly consistent with the absence of any express reference to such covenants in section 1 (1) of the Act, although the vague language of section 1 (2) (a) is perhaps wide enough to cover covenants.

Indirect Enforceability

Assuming that the Law of Property Act, 1925, has done nothing to modify the common law rule laid down in *E. & G. C., Ltd. v. Bate*, the question arises whether the burden of a positive stipulation concerning freehold land can be made to bind successors in title and others by some indirect means, employing some other branch of the law. There would seem to be at least four possibilities, though two of these are of limited application only.

The Law of Easements. It seems clear that, where a covenant exhibits the characteristics of a known easement, then it may be construed and enforced as such. Thus, in *Holms v. Seller* (p), a covenant that an adjoining owner should have the use of a way was held to amount to an easement of way. Similarly, it may be possible to construe a covenant to fence as an easement of fence and so obtain greatly increased rights of enforceability (q). The possibilities provided by the law of easements are, however, obviously limited, though they have been thought worthy of mention particularly because of the common, yet inexplicable, disregard of the admittedly anomalous easement of fence in conveyances of part of the land comprised in a title.

The Application of the Principle Qui Sentit Commodum Sentire Debet et Onus. This principle may apply where the enjoyment of some right or interest in or over land is expressed to be subject to the performance of a positive obligation. In *Westhoughton U.D.C. v. Wigan Coal Co.* (r), a lessee of mines, who had covenanted with the owner in fee simple, his heirs and assigns, not to let down

(p) (1692) 3 Lev. 305.

(q) See *Lawrence v. Jenkins* (1873) L.R. 8 Q.B. 274; *Star v. Rookesby* (1711) 1 Salk. 335.

(r) [1919] 1 Ch. 159.

the surface without making good all damage done and paying compensation, was held bound by his promise at the suit of a lessee of the surface, not on principles of the law of covenants, but on the ground that the lessee of the mines had to show title to let down the surface and having shown it, could not rely on it without acknowledging the limits and obligations attached. The principle so applied may be at the root of the enforceability of a wide class of obligations of everyday familiarity. It is well known that in conveyances which include the grant of a way or drains or suchlike, it is common to find a provision that the easement in question is granted "subject to the payment of a fair proportion of the expenses of maintaining and keeping such [driveway, sewers, pipes, wires, cables, etc.] in good repair." Such an obligation, being positive in nature, is seemingly not enforceable as a covenant, but may well be enforceable under the above principle, or alternatively, though less securely, as a rentcharge (s).

Though it may be useful in a large number of cases, the above principle is necessarily limited in its application for it can only apply in respect of positive obligations imposed in connection with the enjoyment of some right or interest over the land of another and not in respect of positive obligations relating to the land of the covenantor, as, for example, a covenant by a fee simple estate owner to maintain his own property in good repair.

Use of the Rentcharge. It would seem that the rentcharge may be used both directly and indirectly in the attempt to make positive undertakings more widely enforceable.

(a) *Direct application.* With positive covenants the essence of which is the payment of money, such as covenants to contribute towards the upkeep of property vested in another, a wider degree of enforceability than is provided by the law of covenants will be possible if the covenant can be regarded as creating a rentcharge. Thus, in *Moorland v. Cook* (t), the owners in fee simple of five adjoining estates covenanted with each other that a certain sea wall, which was for the common benefit of all in preventing flooding, should from time to time be repaired and maintained at the expense of the owners for the time being of the estates, that the expenses should be borne rateably, and that the expense of each owner should be a charge upon and issue out of his estate. A purchaser took one of the parcels without notice of the covenant and the question was whether he was liable. Lord Romilly M.R. held that he was. It is not easy to discover from the report the basis of

(s) This matter is considered hereafter.

(t) (1868) L.R. 6 Eq. 252.

the decision, though it looks very much as if the principle of *Tulk v. Moxhay* (u) was being extended to positive covenants. In *Austerberry v. Oldham Corporation* (v), however, the decision was explained on the ground that the obligation to contribute was binding as a rentcharge. This method of securing wider enforceability suffers from the defect that the rentcharge may at any time be redeemed by the estate owner whose land is affected under section 191 of the Law of Property Act, 1925. But it does have the merit of ensuring either that payment will be made in accordance with the terms of the covenant or that compensation will be payable in lieu by the *present* estate owner.

(b) *Indirect application.* It is suggested that it may be possible, by a suitable arrangement, to use the rentcharge as an indirect means of securing a wider measure of enforceability for obligations imposed by positive covenants and at the same time minimise the liability of the rentcharge to be compulsorily redeemed under the Law of Property Act. The method depends for its success upon the effectiveness of pecuniary sanctions and is best explained by reference to an example.

Let it be supposed that A is the owner in fee simple of a two storey building and that he is desirous of conveying the fee simple in the lower storey to B. In the conveyance B covenants with A (*inter alia*) to maintain the lower portions of all internal and external walls, which provide support for the upper storey, in good repair. The conveyance also reserves a perpetual yearly rentcharge of £100 in favour of A charged upon the land comprised in the conveyance, but there is included a proviso that if B maintains all the internal and external walls in his storey which provide support for the upper storey in good repair, then the amount of the rentcharge shall be reduced to £5. The conveyance also includes the usual proviso for re-entry for non-payment of any instalment of the rentcharge.

By such an arrangement it is suggested that the desired object would usually be attained. With careful drafting, no question of penalties should arise and the likelihood of B redeeming the rentcharge should be very small owing to the large amount of compensation which would presumably be payable (w).

Rights of Re-entry. If on a conveyance of an estate in fee simple that species of right of re-entry is reserved which entitles

(u) (1848) 2 Ph. 774.

(v) (1885) 29 Ch.D. 750.

(w) See Law of Property Act, 1925, s. 191 (2).

its owner to recover the legal estate, and if it is made exercisable on events which in fact constitute a breach of a positive covenant, then to the extent to which the right of re-entry is itself capable of binding any person interested in the "servient" land, indirect enforceability is given to the positive covenant by the sanction of forfeiture. The exact limits of operation of a right of re-entry depend upon whether it is legal or equitable and whether or not it is made exercisable in regard to a rentcharge held for a legal estate (x), but it is unnecessary to consider these matters here since they have already been given detailed consideration in another article in this journal (y).

It may finally be mentioned that the running of the burden of certain positive obligations is expressly dealt with by statute (z).

(x) See Law of Property Act, 1925, ss. 1 (2) (e) and 4 (3).

(y) See S. M. Tolson, "'Land' without Earth," (1950) 14 *The Conveyancer*, pp. 354-357.

(z) See, e.g., London Building Acts Amendment Act, 1939, Part VI; Law of Property Act, 1925, s. 64.

CONSENT POWERS AND JOINT POWERS

By Professor F. R. CRANE, LL.B., Solicitor

A. GENERAL

Powers of appointment are classified as general or special for several purposes. Farwell's definitions, based simply on the objects of the power (a), have proved inadequate because they do not cover the case of the objects being neither unlimited nor confined to a specified class (b), nor that of restrictions on the exercise of the power, e.g., the requirement of consent. This third group of powers was examined in relation to several principles of law by Mr. J. G. Fleming in an article entitled "Hybrid Powers" (13 *Conveyancer*, p. 20). He reached the conclusion (d) that "the following legitimate divisions may be suggested: between *unlimited* powers which do not impose any restriction on the mode of exercise and class of objects, and *limited* powers which represent the residue and may be subdivided by reference to (1) the existence of restrictions on the mode of exercise and (2) the extent of their exclusion or inclusion of objects." The decision in *Re Churston Settled Estates* (e) (concerning perpetuity) has not only made necessary some modification of the views generally held concerning powers subject to consent (f) but also classified joint powers, whatever their objects, as limited in the above sense. This last classification can properly be called new; there are plenty of instances of joint powers of appointment to be found in the reports, but hardly any indication that they are to be defined by any criterion other than the extent of their objects. Modern social conditions, notably the high rates of estate duty, require that a settlement should provide for flexibility in the beneficial interests. The power of

(a) Farwell on *Powers* (1916), 3rd ed., p. 8, "general powers are such as the donee can exercise in favour of such person or persons as he pleases, including himself. Limited powers, which are sometimes called special powers, are such as the donee can exercise only in favour of certain specified persons or classes." See also Sugden on *Powers*, 8th ed., at p. 394, where the same test is taken.

(b) e.g., *Re Park* [1932] 1 Ch. 580 (anyone except donee); *Re Byron's Settlement* [1891] 3 Ch. 574 (anyone except husband or his relatives or friends); *Re Jones* [1945] Ch. 105 (anyone living at donee's death); *Re Harvey* [1950] 1 All E.R. 491 (anyone "not being her husband").

(d) 13 *Conveyancer*, p. 30. The present writer respectfully agrees. That his debt to Mr. Fleming's analysis is substantial will be obvious: this article attempts to carry the story a stage further.

(e) [1954] Ch. 334.

(f) See *infra*; these powers may be conveniently referred to as consent powers.

appointment is an apt conveyancing device for this purpose, especially where it creates a wide discretion to remodel the trusts (g). In such circumstances settlors are likely to prefer joint to several powers (i) so that *Re Churston Settled Estates* is a decision of some significance. In this article it is proposed to examine the effect of consent and joint powers in several contexts. Before proceeding, however, it will be convenient to set out the facts and decision in *Re Churston Settled Estates*.

Re Churston Settled Estates. The somewhat complicated facts involved a series of family settlements in which the first limitation was always an overriding and unlimited power of appointment by deed, beneficial interests being limited subject to and in default of exercise of the powers (k). In 1895 the Churston estates were settled upon such unlimited uses as John Baron Churston and his son J. R. L. Y. Buller (l) should appoint and, subject thereto, after life interests, etc., upon the first and other sons of J. R. L. Y. Buller in tail. (The present Lord Churston, born in 1910, was the first tenant in tail.) In 1898 the consent power was exercised by creating an unlimited joint power in the three persons named; this was similarly transferred—in effect—in 1923 and 1927; the last-mentioned power (after one death) in 1930 stood vested in the late Lord Churston, M. Ellis and C. J. M. Ellis (m). So far the estate tail of 1895 had not been disturbed but in 1930 the three last-named persons not only transferred the power but also

(g) Compare Powell on *Real Property* [U.S.A.] (1952) Vol. 3, at pp. 288, 289: "The future utilisation and importance of powers of appointment in the United States is inescapable. They still [1951] provide the most important single conveyancing device for the minimising of death taxes. . . . More important . . . is the factor of elasticity which powers of appointment inject into dispositive instruments. This ingredient of elasticity was never so needed as it is at the middle of the twentieth century. The future holds no reasonable hope of a lessening of this need." The decision of the House of Lords in *Chapman v. Chapman* [1954] 2 W.L.R. 723 emphasises the need for provision in the settlement.

(i) Other examples of wide joint overriding or remodelling powers may be found in *Stanyforth v. I. R. C.* [1930] A.C. 339 (the Portman estates); *Potts v. Britten* (1871) L.R. 11 Eq. 433; *Att.-Gen. v. Selbourne* [1902] 1 K.B. 389; *Charlton v. Att.-Gen.* (1879) 4 App.Cas. 427.

(k) Thereby preserving complete flexibility and vesting the "key to the settlement" in the appointor rather than the first tenant in tail. (See Davidson's *Precedents in Conveyancing*, 3rd ed., Vol. III, Pt. 2, at p. 1041.)

(l) John Baron Churston was the grandfather and J. R. L. Y. Buller (who succeeded to the title in 1910 and died in 1930, and is hereafter called the late Lord Churston) the father of the present Lord Churston.

(m) Both M. Ellis and C. J. M. Ellis were alive in 1895 but it seems doubtful if they were sufficiently ascertained to be lives in being for the purposes of the 1895 and 1898 powers, unless—as is not shown—they were parties to the deeds. Compare a gift to A, a bachelor for life, remainder to any wife he may marry, etc.; such a wife, even if alive at the time of the gift, is not a life in being if an unascertained person—cf. *Re Coleman's Will Trusts* [1936] Ch. 528. But the late Lord Churston was a party to each of the first four powers (1895, 1898, 1923 and 1927) and a necessary party to the last two of these.

appointed the property on protective trusts (*n*) for the present Lord Churston for life and thereafter upon trust for his first and other sons in tail. In 1932 the present Lord Churston charged his life interest but the trustees continued to pay him the income in their discretion. There were further transfers of the unlimited joint power in 1940 and 1942. In 1953, on advice, the present Lord Churston disentailed.

Roxburgh J. held (i) the 1895 joint power subject to consent was a special power for the purposes of the Rule against Perpetuities, (ii) so was the 1898 power and (iii) consequently Lord Churston was entitled in fee simple (*o*).

B. CONSENT POWERS AND JOINT POWERS IN RELATION TO THE RULE AGAINST PERPETUITIES

1. *General Application of Rule against Perpetuities to Power of Appointment.*

The Rule against Perpetuities affects (a) the vesting of a power in the donee, (b) the period during which it may remain, on its terms, exercisable and (c) the vesting of the interests actually appointed. Subject to certain exceptions, the general principle is that on each point time must be calculated from the creation of the power (*p*). As to (a), there are no exceptions to the rule (*q*). As to (b), the principle applies clearly to all powers with limited objects—special powers as usually defined (*r*)—to general powers to appoint by will (*s*), and to consent powers or joint powers (*t*). The only exception is an immediate several unlimited power to appoint by deed or will. The latter need not be so restricted because “as the power is equivalent to the fee, the same estates may be created by the force of both. To take a distinction between a general power and a limitation in fee is to grasp at a shadow whilst the

(*n*) So stated in [1954] 1 All E.R., at p. 727, and implied in [1954] 2 W.L.R., at pp. 388-9, and [1954] Ch. 336, but compare p. 338.

(*o*) So stated in [1954] 2 W.L.R., at p. 395, and [1954] Ch., at p. 347, but not in the All England Report. The reasoning in this third point is not set out because counsel were agreed on the result once the powers were classified.

(*p*) This seems, now, the best way to state the law. To start by distinguishing general and special powers is to beg the question of their definition, and there is liable to be confusion if the definitions of Sugden and Farwell are varied.

(*q*) *Re Hargreaves* (1889) 43 Ch.D. 401; *Re Vause* [1938] Ch. 465.

(*r*) *Re De Sommers* [1912] 2 Ch. 623; *Re Vause*, *supra*. A power to appoint to anyone except the donee, as in *Re Park* [1932] Ch. 580, is treated as special—see Fleming, 13 *Conveyancer*, at p. 27.

(*s*) *Wollaston v. King* (1869) 8 Eq. 165.

(*t*) *Re Watts* [1931] 2 Ch. 302 and *Re Churston Settled Estates*, *supra*, are the authorities on consent powers and joint powers.

substance escapes" (a). As to (c), the general principle, though requiring time to be calculated from the creation of the power, allows events at the time of exercise to be taken into account (b). However, time will run from the exercise of an unlimited power to appoint by deed or will, and under this head this exception applies also to unlimited powers exercisable only by will (c). This extension, though apparently established, has been strongly criticised (d).

Two glosses may be added to the above general statement:—

(1) In *Re Churston Settled Estates* the first four powers of 1895, 1898, 1923 and 1927 vested and were exercisable only within the perpetuity period calculated from 1895, for the late Lord Churston, a living person, was in each case a donee (e). Consequently the flaw lay in the vesting of the interests appointed, as to which time was calculated from the creation of the power. Therefore *Re Churston Settled Estates* indicates that the criticised position of general unlimited power to appoint by will is not likely to be extended to hybrid powers (f).

(2) Though the power in *Re Churston Settled Estates* was merely to appoint, it might well have been drafted as a power of revocation and reappointment (g). Is it then possible for a revocation to be effective even though the reappointment fails for some reason, so that the settlement is in effect destroyed? The law does not seem very clear but appears to say that if the power is primary, and is followed by limitations in default of appointment, then the original trust will be displaced only by a valid appointment. If, on the other hand, the trusts are declared and a power of revocation and reappointment superadded, then the settlement may be

(a) Sugden on *Powers*, 8th ed., p. 396; cf. *Farwell on Powers*, 3rd ed., pp. 325-7, 334-5; *Re Fane* [1913] 1 Ch. 404.

(b) *Re Thompson* [1906] 2 Ch. 199; *Re Paul* [1921] 2 Ch. 1; Sugden, pp. 396-7; Farwell, pp. 326-7.

(c) *Rous v. Jackson* (1889) 29 Ch.D. 521.

(d) Gray on *Perpetuities*, 4th ed., para. 526 and Appendix L; Fleming in 13 *Conveyancer* considers Gray to be correct and the law doubtful, but it is submitted that *Rous v. Jackson* is generally accepted.

(e) The 1898 power could have been exercised by John Baron Churston and Lady Churston alone but they were clearly lives in being. The later powers of 1923 and 1927 would have lapsed on the death of the late Lord Churston; the 1930 appointment dealt with the situation by creating a new power to arise on his death. This and other later powers seem to have vested within the period—allowing for events that happened within 21 years of the late Lord Churston's death—but to have been invalid as exercisable outside the perpetuity period calculated from 1895.

(f) Obviously, if the period for the vesting of appointments made is calculated from the creation of the power, so must be the period for the exercise of the power. But the converse is not necessarily true.

(g) As in *Re Watts* [1931] 2 Ch. 302. See Key & Elphinstone, *Conveyancing Precedents*, 15th ed., at pp. 633, 688, especially note at latter page. Such a revocation could be effective at any time within the valid duration of the power.

destroyed by a revocation (*h*). If the appointment is made by will (*i*) the doctrine of dependent relative revocation may apply (*k*). It is suggested, further, that the court would today be reluctant to see a settlement accidentally destroyed (*l*). Nevertheless the point seems one to be specifically considered in drafting.

2. Consent Powers and Perpetuity

In *Re Watts* (*m*) certain appointments under a power to appoint with the consent of the donee's mother were challenged on the score of remoteness. Bennett J., after some unsatisfactory distinction of two earlier cases (*n*), held the power special because the donee was not "in substance the owner of the property and free to deal with it in any way she pleased" (*o*). Roxburgh J. in *Re Churston Settled Estates* regarded this passage as both the *ratio decidendi* of the case and in accordance with authority (*p*), and consequently held the 1895 joint power subject to consent to be special. Regarding the two earlier cases, *Re Dilke* and *Re Phillips* (*n*) to be irrelevant on the question of perpetuity, he further expressly disapproved the view that a consent power was general or special according as consent was required merely to the exercise of the power or to the selection of objects (*r*).

(*h*) *Farwell*, pp. 307 *et seq.*; *Sugden*, pp. 383 *et seq.*; *Saunders v. Evans* (1861) 8 H.L.C. 741; 6 De G.M. & G. 678, and authorities there cited.

(*i*) Consent and joint powers are unlikely to be so exercisable, but the situation is not impossible—see *Re Duddell* [1932] 1 Ch. 585 (joint power validly exercised by will).

(*k*) *e.g.*, *Quinn v. Butler* (1868) L.R. 6 Eq. 225. The passage in Halsbury, *Laws of England*, 2nd ed., Vol. XXV, at p. 566, is written as if this doctrine applies to powers generally, but the cases cited relate to wills.

(*l*) In *Re Watts*, *supra*, a revocation and void reappointment apparently left the original trusts standing. And see the remarks of the Master of the Rolls in *Re Greaves* [1954] Ch. 434.

(*m*) [1931] 2 Ch. 302.

(*n*) *Re Dilke* [1921] 1 Ch. 34; *Re Phillips* [1931] 1 Ch. 347; in *Re Watts* Bennett J. based his distinctions on the type of settlement and duration of consent, but in *Re Churston Settled Estates* Roxburgh J. dissented on those points. See Fleming, 13 *Conveyancer* 20. See also para. 2 below.

(*o*) [1931] at p. 306.

(*p*) [1954] 2 W.L.R. at p. 392. The learned judge did not refer to *Farwell* on *Powers*, 3rd ed., p. 340, where the author states that a general power subject to consent must be exercisable within, or the need for consent confined to, the perpetuity period reckoned from its creation because "so long as the consent must be obtained the donee may never be able to dispose of the property." The authority cited is *Webb v. Sadler* (1872) 8 Ch. 419, where A and B, having a joint power of appointment among children, appointed on such trusts as H, a son, should appoint with the consent of his father or, after his death, of trustees. The later power was void but either remoteness or delegation or both may have been the ground of the decision. Compare *Farwell*, pp. 340 and 344-5, and see *Key & Elphinstone*, 15th ed., at p. 1096, *per* Mr. F. E. Farrer.

(*r*) This view, which, it is thought, received general acceptance, was that of the late Mr. F. G. Farrer—*Key & Elphinstone's Conveyancing Precedents*, 15th ed., Vol. 2, at p. 1096 (14th ed., p. 1049) "A Note on Remoteness." In *Re Joicey* (1932) 76 S.J. 459 and *Fuller v. I. R. C.* [1950] 2 All E.R. 976 consent powers with unlimited objects seem to have been considered as general for some purposes but in neither case was perpetuity in issue.

In *Re Dilke* and *Re Phillips* the only decision was that the donee of each of the respective powers could appoint to himself (s). Further, in both cases the unsuccessful argument was that the power was special and that consequently the donee could not appoint to himself. It is submitted that in this context the learned judges concerned, when referring to general or special powers, were considering only the distinction based on unlimited or limited objects (t). If this be so, the cases were not relevant to the different point taken in *Re Watts* and *Re Churston Settled Estates*.

It seems, therefore, that wherever there is a consent power whether it be joint or several, whatever the duties of the consenting party, and whatever its objects, the perpetuity period will run for all purposes from the creation of the power.

3. Joint Powers and Perpetuity

As has been mentioned, the joint powers in *Re Churston Settled Estates* were held to be special powers under the perpetuity rule. Roxburgh J. found the "true underlying principle" of the distinction between general and special powers to be that the former makes the donee "in substance the owner of the property and free to deal with it in any way he pleased" (u). Referring to *Re Watts*, the learned judge said: "I cannot see that it makes any difference whether the consent required is that of a person not a donee of the power or whether it is the consent of one of the donees of the power. A joint power of appointment is very much further away from ownership than is a general power of appointment vested in an individual" (c). With respect, this reasoning does not take account of the conception of joint ownership, but a passage in *Farwell* (not referred to in the judgment in *Re Churston Settled Estates*) draws the distinction: "no one of the donees [of the power] can dispose of the whole or any part of the property without the consent of the other or others of them, and they cannot, as joint tenants in fee simple can, sever and dispose of a share in the property" (d).

(s) In *Re Dilke* [1921] 1 Ch. 34 such an appointment was challenged; in *Re Phillips* [1931] 1 Ch. 347 the appointment was to a volunteer and the claims of creditors depended on the donee's ability to appoint to himself.

(t) This is particularly noticeable in the judgment of Warrington L.J. in *Re Dilke* [1931] 1 Ch. at pp. 41, 42, where he cites *Farwell's* distinction on this basis.

(u) [1954] Ch. at p. 344, citing from the judgment in *Re Watts*, *supra*.

(c) [1954] Ch. at p. 344. Counsel had argued that as the donees could appoint to themselves, and then dispose of the property as they wished, there was no point in insisting on the formality of two steps.

(d) *Farwell on Powers*, 3rd ed., p. 340. The author was writing of the period of exercise of a power but, for the reasons given above, the passage is relevant also to the vesting of the appointments made.

Nevertheless, as has been mentioned above, this decision on joint powers does appear to be new; it is submitted that earlier authority was at best neutral and the opinions in the precedent books to the contrary. Apart from *Re Watts*, already considered, Roxburgh J. in *Re Churston Settled Estates* treated as of general application certain dicta in *Charlton v. Att.-Gen.* (e) where both James L.J. in the Court of Appeal and Lord Selborne in the House of Lords said that a joint power of appointment was essentially different from a several power or joint ownership (f). In *Charlton v. Att.-Gen.* the question was whether certain appointees derived their succession, under complicated sections of the Succession Duty Act, 1853, from the donors or donees of certain joint powers. Yet, Amplett B., in his judgment in the court of first instance, apparently regarded the power as general for the purposes of perpetuity (g). Neither the Court of Appeal nor the House of Lords commented on his remarks. Further, in *Att.-Gen. v. Mitchell* (h), a later succession duty case, *Charlton v. Att.-Gen.* was followed and succession traced from the donor of a general power conferred on an individual. Consequently, it is submitted with respect that *Charlton v. Att.-Gen.* could equally well have been regarded as an authority simply on the construction of the Succession Duty Act, 1853.

(e) (1876) 1 Ex.D. 204; (1877) 2 Ex.D. 398; (1879) 4 App.Cas. 427.

(f) After passages which Roxburgh J. regarded as limited to the question of succession duty ([1954] Ch. at pp. 345-6) the relevant dicta were as follows:—*Per* James L.J., "A joint power of appointment is, in my opinion, an entirely different thing in intention and practical operation from a general and absolute power of appointment in one individual. In the latter case it is really and practically the equivalent of property—when exercised the property becomes assets. In the other case it is what it purports to be—a form of remoulding a settlement according to the exigencies of the family" (2 Ex.D. 398, at p. 412). *Per* Lord Selborne, "Nothing could well be conceived more unreasonable, in a practical point of view, than to treat a joint power like that now in question, in a family settlement, as equivalent in substance to joint property in the two donees . . ." (4 App.Cas. 427, at p. 466). Both passages are cited in [1954] Ch. at pp. 345-6.

(g) After saying (1 Ex.D., at p. 211) that theoretically one might have to trace back centuries to find someone "out of whose estate, as contradistinguished from power," the interest of the succession was derived, Amplett B. pointed out (p. 214) that this tracing back did not happen in connection with perpetuity where the power was general, and continued (p. 215) "And this very exception to the universality of the rule arises here, for, as I have observed, Dora Meyrick was not living at the date of the settlement of March 23, 1854, and consequently the successive limitations for life to her and her issue if carried back into the settlement of March 23, 1854, would have been void for remoteness. Nor is this objection cured by the fact that these successive life estates to Dora Meyrick and her issue were only to last during the period in the settlement of 1866 mentioned, because that period might have lasted for twenty-one years after the death of Dora's brother Frederick Charlton Meyrick, who like herself was unborn at the date of the settlement of 1854." But actually Dora Meyrick's interest seems to have been good as she was the daughter of a person in being in 1854: it was her succession that was under discussion.

(h) (1881) 6 Q.B.D. 348.

No other authority has been traced in which limitations under a joint power could have been affected by the perpetuity rule (*k*).

As to conveyancing precedents, Roxburgh J. in *Re Churston Settled Estates* (*l*) disapproved Mr. F. E. Farrer's view (*m*) that joint powers unlimited as to objects are general, and also noted the disappearance from the modern books of a precedent in *Davidson* (*n*) of a resettlement by way of appointment which would be void if the perpetuity period ran from the creation of the power. Certainly a precisely similar precedent does not appear but, with respect, the substance is still there. *Key and Elphinstone* (*o*) contains unlimited joint powers (described as general) at pp. 642, 937 and 982, and, at pp. 688 and 774, a form for the exercise of such a power. *Prideaux*, at p. 282, includes such a power in favour of the tenant for life and the first (unborn) tenant in tail, with the footnote that this "may render unnecessary the execution of a disentailing assurance." (*p*) The trusts to follow these powers and the form of exercise are not set out, because the draftsman is left to select the appropriate precedents to suit his case. Nevertheless it is submitted that, quite apart from Mr. Farrer's definite opinion (*m*), reliance on the modern books could easily have produced the *Churston* situation, given the basic idea (*q*).

Since *Re Churston Settled Estates*, therefore, the perpetuity period must be reckoned from the creation of any power requiring the agreement of two or more minds to its exercise. It has been demonstrated that this conclusion makes necessary some revision of earlier views and existing precedents. Yet there can be no gainsaying Roxburgh J.'s general thesis that overriding unlimited consent and joint powers are intended to maintain the very mischief the perpetuity rule is designed to prevent—the tying up

(*k*) In *Webb v. Sadler* (1872) 8 Ch. 419 (see *ante*, note (*s*)) the objects were limited to children, so the power was special anyway. *Wynne v. Griffith* (1862) 1 Russ. 283 is at first sight relevant, for appointments were made to take effect on the death of the intended husband (Robert Wynne) of a donee of the power. Prima facie he was not a life in being but none of the many reports enable one to say whether a Robert Wynne party to the deed creating the power was Robert Wynne the husband or another of the several gentlemen of that name involved in the case.

(*l*) [1954] 2 Ch., at p. 343.

(*m*) "A Note on Remoteness" in *Key & Elphinstone's Conveyancing Precedents*, 15th ed., Vol. 2, at p. 1096 (14th ed., p. 1049).

(*n*) *Davidson's Precedents in Conveyancing*, 3rd ed., Vol. 3, at p. 1281, exercising a power conferred by a precedent at p. 1042, whereby the "key to the settlement" is said to be vested in the appointors.

(*o*) 15th ed., vol. 2.

(*p*) 24th ed. Vol. 3. This statement implies that the perpetuity period runs from the exercise of the power. The precedents in the *Encyclopaedia of Forms and Precedents*, 3rd ed., Vol. 16, pp. 328, 477, 584, seem entirely neutral.

(*q*) Which might have been derived from, say, *Stanyforth v. I. R. C.* [1930] A.C. 379 and adopted primarily for revenue reasons.

of property beyond a certain time (r). Even the normal resettlement after disentailment has been judicially described as a "mode of transmitting family estates from father to son . . . with the least possible danger of these estates, being alienated" (s).

C. OTHER ASPECTS OF CONSENT POWERS AND JOINT POWERS

The following paragraphs are concerned only with wide overriding powers of the *Churston* type. Consent or joint powers to remodel trusts within the limits of a defined class of objects are only examples of the ordinary special power as defined by Farwell and do not call for discussion.

1. *Objects of the Power.* In *Re Churston Settled Estates* it was said that the donees of the power could appoint to themselves, a conclusion which is supported by earlier authorities concerning powers with unlimited objects (a). No trust in favour of the family can be implied in such cases, though obviously the intention is to preserve the family settlements. Extensive flexibility (and perhaps freedom from taxation or estate duty) is achieved only at the cost of sacrificing the control and protection of the court (b). If the donees of the power are carefully selected the danger of a deliberate untoward appointment is probably negligible. Nevertheless, once such a power becomes several, the property may—as will be shown—be available to the single donee's creditors if he should become insolvent. This may be so even if consent is required—an important point of difference between consent powers and joint powers. Consequently, it will normally be undesirable that the power should be so drafted as to continue to be exercisable if the actual donees are reduced to a single survivor. Here the draftsman's natural tendency to provide as far as possible for casualties may prove a danger (d).

2. *Insolvency.* A power to appoint by deed passes to and becomes exercisable by the trustee in bankruptcy if the bankrupt

(r) [1954] 2 Ch. at pp. 346-7.

(s) *Per* Cockburn C.J. in *Att.-Gen. v. Charlton* (1877) 2 Ex.D. 398; he added that "in reality the dominant party is the father."

(a) [1954] Ch., at pp. 344-5; see also *Peover v. Hassall* (1861) 1 J. & H. 341; *Minton v. Kirwood* (1868) L.R. 3 Ch. 614; *Jones v. Davies* (1878) 8 Ch.D. 205; *Farwell*, pp. 118 *et seq.*

(b) No trust can be implied, even if there be no gift over in default—see, for example, *Re Coombe* [1952] Ch. 210; *Re Perowne* [1951] Ch. 785; *Re Mills* [1930] 1 Ch. 654; in each of these cases there was express indication of what was intended. Further, a trust must have ascertainable objects only (*I. R. C. v. Broadway Cottages Trust* [1954] 3 W.L.R. 438) whereas a power can be well exercised in favour of such objects as are ascertainable (*Re Gestetner Settlement* [1953] Ch. 672).

(d) Thus, the precedent in *Key & Elphinstone*, 15th ed., at p. 982, is to be preferred to that at p. 937.

donee could have appointed to himself (e). An appointment made by deed under a general power can be avoided under the Law of Property Act, 1925, s. 172, but not under the Bankruptcy Act, 1914, s. 42 (f). Property which a donee can appoint to himself by will (or by deed taking effect only in death) was in equity, and since 1925 is by statute, assets for payment of the donee's debts (g).

The only relevant decision appears to be *Re Phillips* (h) where Maugham J. held that under the latter head creditors were entitled to property appointed under a several power exercisable with consent. The same reasoning might well be applied in bankruptcy.

Joint powers appear, by their very nature, to fall outside both definitions; neither donee can make the property his own.

3. *Estate Duty*. The question here is whether the donee is competent to dispose at the time of his death (l). The general view seems to be (i) that consent powers are within the statute if consent is required only to the act of exercise, but not if the restriction extends to the selection of objects and (ii) that joint powers are outside the statute, since there is only a power and no interest (m). Whether *Re Churston Settled Estates* will affect the position of current powers remains to be seen.

4. *Wills Act, 1837*. Section 27 enacts that a general gift passes property which the testator may appoint on any manner he may think proper. The better view appears to be that all consent powers, and necessarily all joint powers, are outside the section (o).

5. *Delegation*. If a power reposes a personal trust and confidence in the donee, to exercise his own judgment and discretion, then the maxim *delegatus non potest delegare* is applicable (p). The terms of a power with limited object—a special power in Farwell's sense—clearly imply such a discretion (q); thus, in such a case an appointment on protective trusts cannot be made, nor

(e) Bankruptcy Act, 1914, s. 38; it can be exercised during the bankrupt's life (*Nichols v. Nizey* (1885) 29 Ch.D. 1005) but not after his death; nor can a power to appoint by will be exercised by the trustee (*Re Guedella* [1905] 2 Ch. 331). A several power to appoint to the donee and another is not caught by the section—*Re Taylor's S.E.* [1929] 1 Ch. 435.

(f) *Townshend v. Windham* (1750) 2 Ves.Sen. 1; *Whillington v. Jennings* (1834) 6 Sim. 493; *Re Mathieson* [1927] 1 Ch. 283.

(g) See Williams on *Executors*, 13th ed., Vol. 2, at pp. 955–6; *O'Grady v. Wilmot* [1916] 2 A.C. 231; Administration of Estates Act, 1925, s. 32.

(h) [1931] 1 Ch. 347.

(i) Finance Act, 1894, ss. 2, 22.

(m) Green, *Death Duties*, 2nd ed., (1947), p. 55; Fleming, "Hybrid Powers," 13 *Conveyancer*, at p. 25.

(o) See Fleming, 13 *Conveyancer*, at pp. 29, 30 dealing with consent powers. Green, *Death Duties*, 2nd ed., at p. 55, equates the position under the Wills Act with that for estate duty, but Mr. Fleming's reasoning appears to prevail.

(p) Sugden on *Powers*, 8th ed., p. 179; *Combe's Case* (1613) 9 Co.Rep. 75a; *Ingram v. Ingram* (1740) 2 Atk. 88; *Webb v. Sadler* (1873) 8 Ch.App. 119.

(q) See Farwell on *Powers*, 7th ed., pp. 499 *et seq.*; *Re Joicey* [1915] 2 Ch. 115.

will the courts readily regard the words of the power as waiving the rule (r). However, if the objects are unlimited, there is no restriction on delegation (s).

Ultimately this distinction turns on the construction of the power, but it would seem that both consent and joint powers must be tested by the nature of their objects. In other words, limitations on exercise unconnected with objects will not normally restrict delegation. In *Re Churston Settled Estates* no point was taken on delegation. As has been said, the intention is to give complete control (t).

D. CONCLUSIONS AND SUMMARY

1. Under the Rule against Perpetuities, time will run for all purposes from the *creation* of any consent or joint power. This is new, and existing precedents require to be used with care.
2. The effect of a revocation followed by an invalid appointment may vary according to the drafting of the settlement.
3. If the objects of a power are unlimited in terms there can be no legal but only moral restrictions on the appointments the donee(s) may make; there will be no restriction on delegation.
4. Property subject to a joint power (unlike a consent power) cannot be treated as assets of any donee; the power should not be so drafted as to become several.
5. The traditional division into general and special powers, based on the objects of the power, is inadequate, thereby rendering normal terminology unsatisfactory.

(r) *Re Boulton's Settlement Trusts* [1928] Ch. 703; *Re Morris's Settlement Trusts* [1951] 2 All E.R. 528—here the power was to appoint among children "in such manner in all respects" as the donee thought fit; *Re Porter* (1890) 45 Ch.D. 179. To give a power of advancement is not necessarily an infraction of the rule: *Re Mewburn's Settlement* [1934] Ch. 112.

(s) *Sugden*, p. 196; *Farwell*, p. 505; *White v. Wilson* (1852) 1 Drew 298; *Heather v. O'Neill* (1858) 2 De G. & J. 394.

(t) In *Heather v. O'Neill*, *supra*, a husband and wife, under an unlimited joint power, appointed to such uses as the husband should appoint. This was regarded as valid and no question of delegation raised. Powers that are hybrid because of their objects (see Fleming 13 *Conveyancer* 20) would, it is suggested, be capable of delegation if the objects have become unrestricted (*Re Harvey* [1950] 1 All E.R. 491) or if the donee is one of the objects.

OPTIONS TO PURCHASE AND THE RULE AGAINST PERPETUITIES

By J. H. C. MORRIS, D.C.L., Barrister-at-Law and
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INTRODUCTORY

The Rule against Perpetuities is a doctrine of the law of property, not of the law of contract. Thus, generally speaking, neither the Rule against Perpetuities nor any related rule invalidates a contract calling for payment, even contingent payment, beyond the perpetuity period (*a*). Insurance and suretyship contracts (both contingent obligations) are valid without reference to the time when the contingency may occur or payment may be required.

OPTION TO PURCHASE LAND

But it has been held both in England and in the United States that an option to purchase land is too remote if it can be exercised beyond the perpetuity period (*b*). The reasoning by which this result was reached was as follows. An option to purchase land is specifically enforceable. This gives the option-holder an equitable interest in the land; this interest is contingent upon his election to exercise the option. Contingent interests in land are void unless they must vest (if at all) within the perpetuity period. Therefore an option to purchase which may be exercised beyond the perpetuity period is void to the extent that it creates an interest in land.

Illustration 1. In 1865 a railway company conveyed to A and his heirs for £100 certain land which was no longer required for the purposes of the railway: and A covenanted that he and his heirs and assigns would at any time thereafter reconvey the land to the company for a like sum upon request. In 1880 the company sought to enforce this covenant against

(*a*) *Walsh v. Secretary of State for India* (1863) 10 H.L.C. 367; *Witham v. Vane* (H.L. 1883), printed in Challis, *Real Property*, 3rd ed. (1911) pp. 440 *et seq.*; Gray, *Rule against Perpetuities*, 4th ed. (1942), s. 329.

(*b*) *L. S. W. R. v. Gomm* (1882) 20 Ch.D. 562 (C.A.), overruling *Birmingham Canal Co. v. Cartwright* (1879) 11 Ch.D. 421; *Trevelyan v. Trevelyan* (1885) 53 L.T. 853; Gray, ss. 330-330.6; 6 *American Law of Property* (1952), s. 24.56.

B, who had bought the land from A's heir with notice of the covenant. It was held that it was not entitled to do so (c).

There is no reason to suppose that this doctrine is limited to options to purchase land: it is no doubt applicable also to options to purchase unique chattels (*e.g.*, shares in a private company) if specific performance would be given. The doctrine has been applied in Ireland to options to redeem a rentcharge, whether reserved by the creator of the rentcharge to his heirs or granted to the owners for the time being of the land charged (*d*). It has been applied in England to options to purchase the reversion granted to a tenant under a lease.

Illustration 2. L leases land to T for ninety-nine years and grants T and his assigns an option to purchase the fee simple exercisable at any time during the term. T's assigns cannot specifically enforce the option against L's assigns (*e*).

This question has seldom arisen in the United States; but according to the weight of American authority, an option to purchase contained in a lease is valid, regardless of the length of the lease (*f*).

The doctrine that options to purchase land are subject to the Rule against Perpetuities has proved inconvenient in practice, and the courts have confined it within narrow limits.

(a) Although specific performance is denied if the option is too remote, yet in England damages for breach of contract can be obtained against the option-giver or his estate (*g*). In the United States the opposite has been held on the ground that there is "an irreconcilable inconsistency in refusing to enforce specifically

(c) *L. S. W. R. v. Gomm*, *supra*. The decision was also based on two other grounds: (1) positive covenants made between vendor and purchaser do not run with the land either at common law or in equity; (2) under s. 127 of the Lands Clauses Consolidation Act, 1845, a company selling superfluous land could not reserve any interest therein.

(d) *Re Tyrrell's Estate* [1907] 1 Ir.R. 292 (C.A.); *Re Donoughmore's Estate* [1911] 1 Ir.R. 211; *Re Ramadge's Settlement* [1919] 1 Ir.R. 205. The contrary decision in *Switzer & Co. v. Rochford* [1906] 1 Ir.R. 399 has not been followed. But the Rule does not apply to a covenant in a fee-farm grant giving the grantees liberty to fine down the rent to a peppercorn: *Re Garde-Browne* [1911] 1 Ir.R. 205.

(e) *Woodall v. Clifton* [1905] 2 Ch. 257. In the Court of Appeal, Warrington J.'s decision was upheld on the ground that the covenant did not touch and concern the land within the meaning of 32 Hen. 8, c. 34 (now Law of Property Act, 1925, s. 142), no opinion being expressed on the perpetuities point. However, when the point arose again in *Worthing Corporation v. Heather* [1906] 2 Ch. 532, Warrington J. followed his own previous ratio and not that of the Court of Appeal.

(f) *Hollander v. Central Metal Co.*, 109 Md. 131, 171 Atl. 442 (1908); *Keogh v. Peck*, 316 Ill. 318, 147 N.E. 266 (1928); 4 American Law Institute's *Restatement of Property* (1944), s. 395; 6 *American Law of Property*, s. 24.57.

(g) *Worthing Corporation v. Heather* [1906] 2 Ch. 532, criticised by Walford, 12 Conv.(N.S.) 258 (1948); approved in *Bennett v. Stodgell* (1916) 28 D.L.R. 639, 642 (Ont. C.A.).

covenants concerning an interest in property which violate the Rule against Perpetuities and yet at the same time enforcing an action for damages for refusal to perform such a covenant. Since it is settled that covenants cannot be enforced specifically, it must follow that damages cannot be recovered for such refusal" (h).

(b) In England, but not in the United States, it has been held that the Rule against Perpetuities has no application to an action for specific performance against the original option-giver, even though the option-giver is a corporation and even though the action is brought by the original option-holder's assigns (i). The ground on which this result was reached was that the jurisdiction to grant specific performance is founded not on the equitable interest in the land which the contract confers on the purchaser, but on the ground that damages will not afford an adequate remedy: "in other words, specific performance is merely an equitable mode of enforcing a personal obligation with which the Rule against Perpetuities has nothing to do" (k).

(c) If an option to purchase the reversion is contained in a lease for less than twenty-one years, and after the expiration of the term the tenant remains in possession as tenant from year to year, it is usually held as a matter of construction that the option is exercisable only during the fixed term and cannot be exercised after that term has expired (l). If this were not so, it could be argued that every option to purchase the reversion was too remote, no matter how short the lease.

(d) In a case where this construction was not possible, because the lease was for ten years and thence from year to year and the option was exercisable "during the continuance of the said term or the continuation thereof," the Supreme Court of Canada held that the option did not infringe the Rule against Perpetuities, because the landlord could have destroyed it at any time after the ten years without the tenant's consent by giving him a valid

(h) *Eastman Marble Co. v. Vermont Marble Co.*, 236 Mass. 138, 128 N.E. 177 (1919).

(i) *Hutton v. Watling* [1948] Ch. 26, following *S. E. R. v. Associated Portland Cement Manufacturers, Ltd.* [1910] 1 Ch. 12 (C.A.), and not following *Rider v. Ford* [1923] 1 Ch. 541; affirmed on other grounds [1948] Ch. 398 (C.A.), there being no appeal on the perpetuities point; criticised by Walford, 12 Conv.(N.S.) 258 (1948). In *S. E. R. v. Associated Portland Cement Manufacturers, Ltd.*, a railway company agreed to grant the owner of adjoining land the right to make a tunnel under the railway line. It was held, sixty-two years later, that the company could not restrain an assign of the landowner from making the tunnel, because it was a matter of personal obligation to which the Rule against Perpetuities did not apply.

(k) *Hutton v. Watling* [1948] Ch. 26, 36, *per* Jenkins J.

(l) *Re Leeds and Batley Breweries, Ltd. and Bradbury's Lease* [1920] 2 Ch. 548; *Re Devine and Ferguson* [1947] 1 D.L.R. 76 (Ont.).

notice to quit (*m*). The option therefore fell within the well-established principle that a future interest which can be destroyed at will by the owner of the present interest is not within the Rule.

(e) If a contract to sell land fixes no time for completion, the interest in the land which the contract confers on the purchaser is not too remote, because it will be inferred that the contract was to be completed within a reasonable time (*n*).

(f) Though case authority is lacking, it may be assumed that if the option-holder is an individual, not a corporation, and if the option is construed to be personal to him and not transmissible, it could not be too remote because it would have to be exercised, if at all, within his lifetime (*o*).

(g) If options are specifically enforceable against the option-giver, as was held by Jenkins J. in *Hutton v. Watling* (*p*), and if options in leases to purchase the reversion do not touch and concern the land, as was held by the Court of Appeal in *Woodall v. Clifton* (*q*), then it follows that for practical purposes such options are not subject to the Rule against Perpetuities at all. They can always be enforced against the original option-giver, no matter how remote they are; they can never be enforced against the option-giver's assigns, for a reason which has nothing to do with the Rule against Perpetuities.

Perpetually renewable leaseholds. It has been settled for at least two centuries that the Rule does not apply to options to renew leases, even perpetually (*r*). There has been much doubt whether this ranks as an exception to the Rule, or whether it can be explained on the ground that the option to renew is part of the tenant's present interest. Gray (*s*) was of the latter opinion; though he admitted that the explanation was not satisfactory in cases where the right of renewal arose only on giving notice within

(*m*) *Auld v. Scales* [1947] 4 D.L.R. 721, following *McMahon v. Swan* [1924] V.L.R. 397, and not following *Rider v. Ford* [1923] 1 Ch. 541. In *Auld v. Scales*, the parties were the original option-giver and option-holder, but the court did not discuss this way of escape from the Rule.

(*n*) *Re Doyle's Estate* [1907] 1 Ir.R. 204; cf. *L. S. W. R. v. Gomm* (1882) 20 Ch.D. 562, 580.

(*o*) See *Rider v. Ford* [1923] 1 Ch. 541, 546; cf. *Skelton v. Younghouse* [1942] A.C. 571 (option given by will).

(*p*) [1948] Ch. 26.

(*q*) [1905] 2 Ch. 257.

(*r*) *Ross v. Workop* (1740) 1 Bro.P.C. 281; *Sweet v. Anderson* (1772) 2 Bro.P.C. 256; *Hare v. Burges* (1857) 4 K. & J. 45; *Pollock v. Booth* (1875) I.R. 9 Eq. 229, 607 (C.A.); *Moore v. Clench* (1875) 1 Ch.D. 447, 452; *L. S. W. R. v. Gomm* (1882) 20 Ch.D. 562, 579; *Muller v. Trafford* [1901] 1 Ch. 54, 60-61; *Woodall v. Clifton* [1905] 2 Ch. 257, 263, 265, 268; *Re Tyrrell's Estate* [1907] 1 Ir.R. 194, 197; *Re Jackson and Imperial Bank of Canada* (1917) 36 D.L.R. 589 (Ont.); *Rider v. Ford* [1923] 1 Ch. 541.

(*s*) Gray, ss. 230-230.2; approved in *Guardian Realty Co. v. Stark* (1922) 70 D.L.R. 333, 342, per Duff J. (Supreme Court of Canada).

a particular time and paying a specified fine. In England, it is no longer necessary to make an exception, for perpetually renewable leaseholds are converted by statute into terms of two thousand years (*t*).

CRITIQUE

The reasoning whereby options to purchase land were held to be subject to the Rule against Perpetuities has already been stated (*u*). The reasoning is unassailable if one is willing to ignore the pressures which caused the Rule against Perpetuities to be formulated and the reasons which produced a perpetuity period comprising twenty-one years after lives in being. Excessively long family settlements were the threat which produced the Rule; and the perpetuity period was designed to fit the needs of family gift transactions. To derive from a rule thus motivated and thus formulated a general concept applicable to commercial transactions was a step of doubtful wisdom. Lives in being have no significance in commercial transactions, nor has the period of twenty-one years. Moreover, in accordance with standard perpetuities doctrine, when an option is held to be too remote the entire option is struck down, instead of only the excess beyond some permissible shorter period. This is unduly punitive on one party to the advantage of another who may be equally at fault. The usual case involves an option which the option-holder attempts to exercise within a very short period; the Rule against Perpetuities is seized upon by the owner to escape from his contract on the ground that the option might have been exercised too remotely—a situation which does not appeal to the common sense of business men or the ethical sense of anyone. Like the late lamented Statute of Frauds, the Rule becomes a destroyer of bargains which in all conscience ought to be performed.

A case can be made out for imposing some time limit on options to purchase land in gross (that is, those not contained in a lease of the land). Where A owns Blackacre and gives B such an option, A is inhibited from developing or improving the land, for B can at any time exercise the option and thus take the benefit of A's labour and investment. The period of perpetuities is far too long a time in which to allow such options to be valid, for in skilful hands the period can be made to last about a century. However, in such cases the self-interest of the parties can be relied upon to see that long-term options are kept well within the limits of the public interest. An owner of land will not be likely to give such

(*t*) Law of Property Act, 1922, s. 145 and Fifteenth Schedule.

(*u*) *Ante*, p. 576.

an option if development of the land is a real possibility : and if such an option is given, the self-interest of the option-holder will lead him to exercise the option and develop the land as soon as such action offers an opportunity for profit.

The application of the Rule to options in a lease is particularly obnoxious in that it defeats the basic purpose of the Rule. Here the situation is the exact opposite to that which exists in an option in gross. The option-holder, not the option-giver, is in possession of the land. He is the only person who can develop the land during the continuance of the term. The improvement of the land is stimulated, not retarded, by the existence of the option. If the lessee has an option to purchase he can safely improve ; for, by the exercise of the option, he can preserve to himself the benefit of the improvement. If he has no option, he must (unless statute intervenes) so regulate his improvements that they are overtaken by obsolescence at the end of the term. An option to purchase in the tenant, regardless of the length of the lease, is important to procuring the full utilisation of the land : and this, after all, is one of the basic purposes of the Rule against Perpetuities.

It is not surprising that English courts should have been tempted to whittle away the doctrine that options to purchase are subject to the Rule. But, assuming (as they were bound to assume) that that doctrine exists, it cannot be said that their efforts have made the situation much better. There would seem to be no justification for holding the option not specifically enforceable against assigns of the option-giver but enforceable against the option-giver himself. The objection to a long option, from the point of view of the public interest, is that it inhibits the improvement of the land by the owner in possession. This is equally true whether the land is held by the original option-giver or by his transferees. Nor can there be any justification for refusing specific performance against the option-giver's assigns but granting money damages against the option-giver or his estate. For the threat of an action for damages is likely to inhibit development of the land as much as the threat of an action for specific performance. Moreover, to refuse specific performance but yet to grant damages means that the option-giver will not dare to convey the land to a transferee, for the transferee might greatly increase the value of the land by improvements and thus increase the liability in damages of the option-giver. Something seems amiss when the Rule against Perpetuities actually inhibits the free alienation of land.

The English authorities as they now stand can be reduced to the following propositions :

(a) If A gives B an option to purchase land which is unlimited as to time, the option can be specifically enforced against A as long as he still owns the land. If A transfers the land to C, the option cannot be specifically enforced against C. But B can collect damages from A or A's estate.

(b) If A leases land to B for any term exceeding twenty-one years and gives B an option to purchase the reversion at any time during the term, the same rules apply. That is, the option is specifically enforceable against A as long as A holds the reversion; if A transfers the reversion to C, the option cannot be specifically enforced against C; but A or A's estate is liable in damages.

It is suggested that the mere statement of these rules in sequence indicates the need for a review of the option problem and corrective action. No one could be content with this state of the law except C who discovers, certainly with delight and probably with surprise, that he can ignore the option and let someone else pay the bill of damages.

It should be borne in mind that, quite apart from the Rule against Perpetuities, an option may be void if it constitutes an undue restraint on freedom of alienation. Thus, in *Re Rosher* (a) a testator devised Blackacre to A in fee simple, on condition that A and his assigns should not sell Blackacre without first offering it to B at one-fifth of its real value, and should not lease Blackacre without first offering it to B at one-quarter of its proper rent. It was held that the condition was void, although it was restricted to the life of B and was therefore not too remote.

CONCLUSION

The present state of English law on the application of the Rule against Perpetuities to options exhibits all the traditional defects of case law and none of its virtues. A logical but unpractical decision of the Court of Appeal has the effect of destroying bargains and disappointing the legitimate expectations of business men. Courts of first instance struggle to restrict its effect within the narrowest limits, but in doing so they inevitably introduce distinctions which are hard to justify. As a result the law is in an uncertain state, more especially as no appellate court in England has pronounced on the problem for over seventy years. The intervention of the legislature is long overdue. It is submitted that the simplest and probably the best reform would be an enactment that the Rule against Perpetuities shall not apply to options of any kind. It is a serious thing to strike down testamentary dispositions

(a) (1884) 26 Ch.D. 801.

in the name of public policy. It is even more serious to strike down bargains freely entered into where no threat to the public interest can be shown to exist (b). An examination of the cases in which options have been invalidated because of the Rule against Perpetuities will reveal a series of episodes in which lawyers have enabled owners to escape from obligations freely assumed; it will not reveal cases in which the performance of these obligations would have caused any detriment to the public interest.

(b) In New York, options unlimited as to time are valid and specifically enforceable: *Re Waterfront, City of New York*, 246 N.Y. 1, 29, 157 N.E. 911 (1927). New York is a state with a wide variety of industrial and agricultural activity, an enormous range of land valuation and types of use, and a bar astute to seize upon doctrines of the law which might prove usable by clients seeking to attain various personal objectives. Yet no difficulties seem to have arisen; no demands for time restrictions on options seem to have been voiced.

THE LAW OF RATING

PART VI

By WILLIAM SCRIVENS, M.A., LL.B., Barrister-at-Law, and
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PRACTICE AND PROCEDURE

In this final article matters of practice and procedure will be considered under the following headings :

- (1) The Rating of Owners.
- (2) The Valuation List.
- (3) The Making of the Rate.
- (4) Appeals against the Rate.
- (5) Recovery of Rates.

(1) THE RATING OF OWNERS

In general it is the occupier of land who is liable to pay rates in respect of it, since it is occupation which founds liability. The occupier may by private agreement have some right of indemnity against the owner of the land, but this does not, of course, in any way affect his liability to the rating authority. In certain cases, however, the owner of the land may become primarily liable for the payment of rates either by agreement with the rating authority or under compulsion. This system whereby the owner is substituted for the occupier is commonly known as "compounding."

Land outside the County of London

Provision is made for the rating of owners of hereditaments outside the County of London by section 11 of the Rating and Valuation Act, 1925. Prior to the passing of the Act of 1925, however, local Acts had frequently made similar provisions for the rating of owners in lieu of occupiers. Such special provisions may have been continued in force by resolution of the rating authority made under subsection 11 (10) of the Act of 1925. Where, however, no such resolution has been passed, the provisions of section 11 will now apply in substitution for those contained in earlier local Acts.

The term "owner" is specially defined for the purposes of section 11 to mean "the person who is, or if the hereditament were occupied would be, entitled to receive the rent payable in respect

thereof, or where the hereditament is occupied free of rent, the person by whose permission it is so occupied" (a). Thus it is perfectly possible for a reversionary lessee to be rated as the "owner" of the hereditament to the exclusion of the owner of the fee simple in reversion. The definition does not include a person who receives rent as agent for another and not for his own use and benefit (b).

The rating authority may by resolution direct that the owners of hereditaments of a certain class within its rating area shall become liable for the payment of the rates in respect thereof. Such a class of hereditaments must be defined by reference to rateable value and in general the rateable value of the hereditaments included in the class may not exceed £13 (c). The rating authority may in addition define the class of hereditament by reference to the interval at which rent from time to time becomes payable, but it is not bound to do so. It is to be noted that the rating authority has no power to rate the owners of only some of the hereditaments within a class: the resolution must apply to all such hereditaments. This does not mean, however, that the resolution must refer to all hereditaments whose rateable values do not exceed £13: it may, for instance, apply merely to all hereditaments whose rateable values do not exceed £10 (d).

Where the rating authority passes such a resolution, it is bound to make to the owner who pays the amount due before the expiration of one-half of the period of the rate, or if the rate is made payable by instalments before the expiration of half the period of the instalment, or before such other date as may be specified in the resolution (e), an allowance of 10 per cent. on the amount payable, or a greater allowance up to a maximum of 15 per cent. if the authority so determines by a resolution of general application (f). The owner-occupier is not entitled to this allowance, since he is by the general law liable for payment of the full amount of the rate as an occupier. Where, however, the rating authority is the owner of hereditaments within the terms of the resolution, then the authority is bound to make to the owner-occupiers of hereditaments also falling within the terms of the resolution an

(a) s. 11 (11); cf. the definition of "owner" contained in s. 68 of the Act.

(b) *Adams and Watts v. Southall Rating Authority* [1943] K.B. 359 (a decision on a similar definition contained in a local Act).

(c) Proviso to s. 11 (1). When s. 55 of the Local Government Act, 1948, is brought into force by order of the Minister this figure will be £18.

(d) A rating authority has power to rescind such a resolution. Such rescission takes effect at the expiration of the period in respect of which the rate is made: s. 11 (3).

(e) s. 11 (1) (a).

(f) s. 122 of the Local Government Act, 1948.

allowance equal to the allowance, if any, which the rating authority makes to the occupiers of its own hereditaments. In the absence of contrary evidence the amount of such allowance is to be deemed to be 5 per cent. of the amount payable. Owner-occupiers are, however, only entitled to this allowance if they pay the amount due within the period appropriate to other owners (g).

A rating authority has, in addition to the compulsory power described above, power to enter into agreements with the owners of hereditaments the rents of which become payable or are collected at shorter than quarterly intervals, whereby such owners become liable for the payment of rates. There is no limit upon the rateable value of the hereditaments to which such agreements may relate (h). Such agreements may be of three kinds :

- (i) the owner may agree to pay the rates chargeable whether the hereditament is occupied or not ; or
- (ii) the owner may agree to pay the rates so long as the hereditament is occupied ; or
- (iii) the owner may agree to collect the rates due from the occupier on behalf of the rating authority (i).

In return for such an undertaking by the owner the authority may agree to make him an allowance provided that he makes payment by the dates specified in the agreement. The amount of such allowance must not exceed in case (i) above 15 per cent., in case (ii) $7\frac{1}{2}$ per cent. and in case (iii) 5 per cent.

The rating authority is not bound to enter into such agreements with all the owners whose hereditaments fall within section 11 (2) of the Act or with any particular class of such owners. Such agreements may exist concurrently with a compulsory resolution. It is not, however, to the advantage of an owner to enter into the second or third type of agreement where his hereditament is within the terms of a compulsory resolution, since the less favourable allowances under the agreement will prevail against the allowances payable upon compulsory rating (k). However, both the owner and the rating authority may determine any of the three types of agreement by notice taking effect upon the expiry of the next complete rating period after its service (l). An agreement remains in force until expiry of such a notice notwithstanding a change of ownership and is enforceable by and against the new owner.

(g) s. 11 (1) (b).

(h) s. 11 (2).

(i) The amount due from such an owner is not necessarily the whole amount of the rates: it is "the amount which bears to the total amount of the rates due the same proportion as the aggregate actually collected by him in respect of rent and rates bears to the aggregate amount due in respect thereof": s. 11 (5).

(k) s. 11 (2).

(l) s. 11 (3).

Recovery of rates under section 11

Where an owner is rated whether compulsorily or by agreement, the amount due from him may be recovered from him or where the rates are collected by his agent, either from him or his agent in the same way as rates may be recovered from occupiers of rated hereditaments (*m*). Notwithstanding that the owner is rated, the occupier's name is to be entered in the rate book (*n*). If the owner fails to pay the amount due, then the occupier may pay and deduct the amount thereof from the rent payable to the owner. Moreover, the rating authority may make a written demand for the rates to the occupier and if he fails to pay the same within fourteen days may levy distress upon his goods and chattels (*n*). In such an eventuality the occupier may deduct the amount of rates for which distraint is made together with the expense of distraint from the rent payable to the owner (*o*).

Land within the County of London

Within the County of London the statutory provisions at present in force with regard to the rating of owners are contained in sections 3 and 4 of the Poor Rate Assessment and Collection Act, 1869. The owners of hereditaments whose rateable value does not exceed £20 (*p*) may be compulsorily rated, but are to be allowed an abatement of 15 per cent. for due payment and a further abatement of 15 per cent. if they undertake to be rated for a period of not less than a year whether or not the hereditament is occupied. Alternatively, agreements may be made with such owners whereby they undertake to be rated for a period of not less than a year whether the hereditament be occupied or not and are allowed in return a commission of not more than 25 per cent.

Provision has, however, been made by section 43 of the London County Council (General Powers) Act, 1949, for the future application of section 11 of the Rating and Valuation Act, 1925, to hereditaments within the Metropolis. The power to rate owners compulsorily is extended to all hereditaments whose rateable value does not exceed £25. The Minister of Housing and Local Government has not yet, however, appointed a day when these provisions shall come into force and the provisions of sections 3 and 4 of the Act of 1869 cease to have effect.

(*m*) s. 11 (5). See *infra*, pp. 608 *et seq.*

(*n*) s. 19 of the Poor Rate Assessment and Collection Act, 1869, incorporated by s. 11 (7) of the Act of 1925.

(*o*) s. 12 of the Poor Rate Assessment and Collection Act, 1869, incorporated by s. 11 (7) of the Act of 1925.

(*p*) s. 3 of the Act of 1869. When s. 43 of L. C. G. (General Powers) Act, 1949, comes into force the figure will be £25.

(2) THE VALUATION LIST

The valuation list dates from 1862 when it was provided by the Union Assessment Committee Act of that year that such lists should be prepared and that no poor rate should be valid unless calculated in accordance with the net annual values of the hereditaments appearing in the list. The Union Assessment Committee Act has since been repealed (*q*), but the system which it instituted remains in modified form and must now be considered under the following headings:

- (a) The form and effect of the valuation list.
- (b) The making of the valuation list.
- (c) Alterations of the current valuation list.
- (d) Appeals relating to the valuation list.

(A) *The Form and Effect of the Valuation List*

The Local Government Act, 1948, has effected very considerable alterations in the law governing the preparation and amendment of valuation lists, but has not affected the law relating to their form and contents which is still to be found in the Rules made under the Rating and Valuation Act, 1925 (*r*).

A separate division of the valuation list is to be made for each parish in the rating area, for each part of a parish which is subject to separate or differential rating (*s*) and for each part of a parish which is a "contributory place" under the Public Health Act, 1936 (*t*).

No particulars are to be entered of the following types of land:

- (i) Agricultural land and buildings as defined by section 67 (1) of the Local Government Act, 1929, and section 2 (2) of the Rating and Valuation (Apportionment) Act, 1928 (*u*).
- (ii) Premises which are or form part of a railway or canal hereditament and are occupied for the purposes of the British Transport Commission within the meaning of sections 85 and 86 of the Local Government Act, 1948 (*a*).
- (iii) A hereditament occupied by the British Electricity Authority or by an Area Electricity Board: section 85 of the Local Government Act, 1948 (*a*).

(*q*) Outside London by s. 69 of the Rating and Valuation Act, 1925: within London by s. 147 (1) of the Local Government Act, 1948.

(*r*) s. 21 (1): applied to London by s. 7 of the Rating and Valuation (Apportionment) Act, 1928. The relevant rules are the Rating and Valuation Acts (Form of Valuation List) Rules, 1932 (S.R. & O. 1932, No. 395), outside London and the London (Valuation Lists) Rules, 1933 (S.R. & O. 1933, No. 785) within London.

(*s*) s. 21 (2) of the Act of 1925.

(*t*) ss. 308, 343.

(*u*) See *ante*, p. 169.

(*a*) See *ante*, p. 174.

All other exempted hereditaments (b) are to be entered in the valuation list, but so long as the occupier is wholly exempt from payment of rates, no values are to be entered against them. In the case, however, of hereditaments which are exempt by reason of their occupation by or for the purposes of the Crown, the values by reference to which the Crown's contribution in aid of the rates are calculated are entered in the list as if they were the rateable values (c).

So far as land outside the county of London is concerned, it is provided by section 20 (1) of the Rating and Valuation Act, 1925, that for the purpose of every rate the valuation list as in force at the time when the rate is made shall be conclusive evidence of the values of the hereditaments included in it. A similar provision is contained in section 45 (1) of the London County Council (General Powers) Act, 1949, with regard to land within the county of London.

(B) The Making of the Valuation List

Prior to the passing of the Local Government Act, 1948, the law relating to the making of valuation lists for land within and without the county of London was contained in the Valuation (Metropolis) Act, 1869, and in Part II of the Rating and Valuation Act, 1925, respectively. The valuation lists currently in force were prepared in accordance with those statutes, but all future lists whether they relate to land, within or without the county of London, will be made in accordance with the provisions of the Act of 1948. Accordingly it is the provisions of this Act which will here be described.

Section 34 of the Act of 1948 specified April 1, 1952, as the date when new valuation lists should come into force outside London and April 6, 1952, as the date within London. The coming into force of new valuation lists has, however, been three times postponed. At present, the proposed date is April 1, 1956, outside London and April 6, 1956, inside London (d). Since under the Act of 1948 new valuation lists are to be prepared so as to come into force at five-yearly intervals (e), the second valuation lists made under the Act ought to come into force in 1961.

Valuation Officers

Under the Acts of 1869 and 1925 it was the function of the appropriate local authorities to carry out the valuations necessary

(b) See *ante*. pp. 154 *et seq.*

(c) s. 64 (3) of the Act of 1925.

(d) New Valuation Lists (Postponement) Act, 1952: New Valuation Lists (Postponement) Order, 1954 (S.I. 1954, No. 272).

(e) s. 34 (2).

for the making of the valuation lists. Section 33 of the Act of 1948 removes from the rating authorities their functions in relation to the preparation and amendment of valuation lists and provides that these functions shall be performed by valuation officers of the Commissioners of Inland Revenue.

Returns and Inspections

The valuation officer is empowered for the purpose of making a new valuation list or of amending the current list to serve a notice on the occupier, owner (f) or lessee of any premises requiring him to make a return containing such particulars as may reasonably be required for the purposes of enabling the valuation officer to compile the new list or to decide whether or not to make or object to a proposal for the amendment of the current list (g). Any person upon whom such a notice is properly served (h) must make a return in form required by the notice within twenty-one days of its service and if he fails without reasonable excuse to do so, or knowingly or recklessly makes any material false statement in his return, commits a criminal offence (i).

The valuation officer or any person authorised by him in writing may after giving twenty-four hours' notice in writing enter, survey and value any premises in the area for which the valuation officer acts (k). Furthermore, the valuation officer may require the surveyor of taxes to provide him with a copy of the annual values currently in force for income tax purposes under Schedule A of the Income Tax Act, 1952 (l) for properties in his area. It is also the duty of any local authority (m) to pass to the valuation officer any information which suggests that the valuation list is in need of amendment.

Preparation of a Draft List

From information obtained in the above ways it is the duty of the valuation officer to draft the valuation list for the rating

(f) An "owner" means "any person for the time being receiving the rack rent of the lands or premises in connection with which the word is used whether on his own account or as agent or trustee for any other person, or who would so receive that rent if the lands or premises were let at a rack-rent": s. 68 (1) of the Act of 1925 as adopted by s. 144 (1) of the Local Government Act, 1948.

(g) s. 58 (1) and (2).

(h) s. 58 (3) (4) (5) and (6).

(i) The mode of service is prescribed by s. 59 of the Act of 1925: extended by s. 63 of the Act of 1948 to London.

(k) s. 60 of the Act of 1948.

(l) See s. 82 of the Act.

(m) "The council of a county, county borough, metropolitan borough or county district, or the Common Council of the City of London": s. 144 (1) of the Act of 1948.

area (*n*). The valuation officer may not treat any hereditament as an agricultural, industrial or freight-transport hereditament unless it was so treated for the purposes of the last preceding list or unless a claim is made for the hereditament to be so treated by the owner or occupier (*o*). On completion of his draft the valuation officer is required to transmit three copies to the rating authority and to publish notice of completion of the draft (*p*). The notice must specify that copies of the draft list are open to inspection at the rating authority's offices for a period ending twenty-one days after publication of the notice (*q*).

Where the draft list includes some hereditament not previously assessed, the valuation officer must within seven days of the completion of the draft send to the occupier of the hereditament notice of the gross net annual and rateable values included in the list (*r*).

A failure to observe any of the above formalities will not of itself, however, render the list invalid (*s*).

Objections to the Draft List

Section 36 (1) of the Act of 1948 provides that "any person who is aggrieved

- (a) by the inclusion of any hereditament in the draft list; or
- (b) by any value ascribed in the draft list to a hereditament or by any other statement made or omitted to be made in the draft list with respect to a hereditament; or
- (c) in the case of a building or portion of a building occupied in parts, by the valuation in the list of that building or portion of a building as a single hereditament

may at any time before the expiration of 25 days from the date of the publication of notice of completion of the draft list, serve on the valuation officer notice of objection to the draft list so far as it relates to that hereditament" (*t*).

Quite clearly the occupier of a hereditament is "aggrieved" if the valuations of his hereditament are too high. Equally he is

(*n*) A "rating area" is the area of a "rating authority": s. 68 (1) of the Act of 1925. A "rating authority" means a county borough council, an urban or rural district council, a metropolitan borough council, the Common Council of the City of London, the Under-Treasurer of Inner Temple, the Sub-Treasurer of the Middle Temple: s. 1 (2) of the Act of 1925, s. 7 (2) Rating and Valuation (Apportionment) Act, 1928, ss. 123 and 144 of the Act of 1948.

(*o*) s. 35 (3) of the Act of 1948. The appropriate form of claim is specified by the Rating and Valuation (Forms of Proposal and Claim) Regulations, 1949 (S.I. 1949, No. 2311).

(*p*) The Minister of Housing and Local Government has power under s. 71 to prescribe the mode of publication.

(*q*) s. 35 (2).

(*r*) s. 35 (1).

(*s*) s. 38 (6).

(*t*) An objection may relate to more than one hereditament in the same draft list: s. 64.

aggrieved if the valuations of other hereditaments in the rating area are too low, since the consequence of their remaining too low would be to throw a greater burden of rates upon himself. Similarly the occupier of a hereditament can be aggrieved by the exclusion from the draft list of a hereditament which ought to have been included. It is a matter of doubt, however, whether this objection can be taken. It would appear that the reference in (b) to the omission of a statement relates to an omission concerning a hereditament included in the draft list and not to the total omission of the hereditament.

It is expressly provided by section 33 of the Act of 1948 that nothing in that section shall affect the "rights of a rating authority as a person who is aggrieved by anything done or omitted to be done by the valuation officer in a valuation or draft list in relation to any hereditament." The section does not appear to do more than expressly preserve the rating authority's rights as a person aggrieved and the question arises whether the rating authority has wider powers of objection than any other person. The rating authority is almost bound to occupy hereditaments within its own rating area, so that it will at least enjoy the same rights of objection as other occupiers within the area. A private occupier, however, would not normally be aggrieved by the fact that the valuation of another hereditament or class of hereditaments was too high, but it might well be that the rating authority would wish to object in such a case. There can be no decision on this point until a draft list is prepared under the Act of 1948, but it may be noted that in *Grainger v. Liverpool Corporation* [1954] 2 W.L.R. 275 it was held that the rating authority, as the authority interested in the fair and proper rating of its area, is a person aggrieved by any inequalities or under-rating in the valuation list and is under a duty to make a proposal for their amendment (u).

Every notice of objection must be in writing and must state the grounds on which the objection is made and the amendments desired to remove the objection (a). It would appear by analogy with a decision already given as to the form of proposals, that it will be sufficient for an objection to the amount of a valuation contained in the draft to state whether it requires the list to be amended by the increase or decrease of the valuation and that it will not be necessary to specify exact figures (b). It will, of

(u) s. 40 of the Act which deals with proposals closely follows the wording of s. 36. It is still not clear whether even a rating authority could make a proposal for the inclusion of a hereditament totally excluded from the list. See, however, the definition of "alteration" in s. 144 (9), *infra*, pp. 595 *et seq.*

(a) s. 36 (2).

(b) *Jolly (Oldham), Ltd. v. Almond (Valuation Officer)* (1951) 44 R. & I.T. 374 (L.T.).

course, be necessary to indicate the hereditament to which the objection relates, and in the case of an omission or inaccuracy in the draft list to state the amendment required.

Revision of Draft Lists

After the period of twenty-five days for the lodging of objections has expired it is the duty of the valuation officer to revise the draft list by making such alterations as he thinks proper, whether for the purpose of meeting any objection or for any other reason (c). He may not, however, treat any hereditament as an agricultural, industrial or freight-transport hereditament unless it was so treated in the last preceding list, or a claim that it should be so treated has been made by the owner or occupier of the hereditament or an objection has been made on the ground that it ought to be so treated (d).

Where the valuation officer makes any alteration in the draft list, he must serve written notice of the alteration upon both the occupier of the hereditament in question and upon the rating authority. The occupier of a hereditament in respect of which an alteration is made need not, however, be notified of an alteration which consists merely of the reduction of a value ascribed to the hereditament if he has not given any notice of objection (e). The valuation officer must serve notice upon every person who gave notice of objection to the draft list stating whether he has made any, and if so what, alteration in the draft list. There is, however, no need to serve two notices upon one person, one because he is an objector and the other because an alteration has been made (f). A notice of an alteration or a notice to an objector must contain a statement of the rights of appeal conferred by section 37 of the Act (g).

Appeals

The following persons may appeal from the decision made by the valuation officer on the revision of the draft list by a serving a notice of appeal upon him within the following times:

- (i) the person who served notice of objection: before the expiration of twenty-one days following the service upon him by the valuation officer of the notice stating how the objection has been treated;
- (ii) the owner or occupier of the whole or any part of a hereditament in relation to which the valuation officer has

(c) s. 37 (1).

(e) s. 37 (2).

(g) It must also contain a statement of the address to which the notice of appeal may be sent to the valuation officers: s. 63 (2).

(d) Proviso to s. 37 (1).

(f) s. 37 (3).

made an alteration on revising the list (other than a reduction in value not made in pursuance of an objection): before the expiration of twenty-one days from the service upon the occupier of notice of alteration;

- (iii) the rating authority: before the expiration of twenty-one days of the service upon them of the valuation officer's notice whether it be notice of his treatment of the authority's objection or whether it be notice of alteration to the authority as occupier.

A notice of appeal must be in writing and contain a statement of the grounds of the appeal. Within seven days of the receipt of such a notice of appeal the valuation officer is required to send a copy of the notice to the occupier of the hereditament in question and to the rating authority (*h*). The valuation officer is also required to notify the clerk of the Local Valuation Panel that notice of appeal has been given (*i*).

Settling of the Valuation List

Not later than the end of December preceding the date on which the new valuation list is to come into force, it is the duty of the valuation officer to settle the list, sign it and transmit it to the rating authority and give notification that he has done so to the clerk to the local valuation panel (*k*). Before settling and signing the list the valuation officer must give effect to any decisions already given upon appeal or to any agreements made between the parties to an appeal whereby the appeal has been withdrawn. He is not, however, required to await the determination of all appeals before settling and signing the list. Where a decision on appeal against the revised list is not given until after the list has been settled and signed, effect is to be given to such decision as if it were a decision upon a proposal for the amendment of the current valuation list (*l*).

The valuation may also correct any clerical or arithmetical error in the list before settling and signing it. He is also bound to insert in the list such particulars as to the total values of the rating area or part of the area liable to be charged separately as may be prescribed (*m*). Subject to the above, however, the settled list is to conform to the revised list (*n*).

(*h*) He need, of course, not send a copy to the appellant be he occupier or rating authority.

(*i*) s. 48 (1): for subsequent procedure, see *infra*, p. 598.

(*k*) s. 38 (1). See *infra*, p. 599, as to valuation panels.

(*l*) s. 38 (2) and (5). See *infra*, pp. 595 *et seq.*

(*m*) The particulars have not as yet been prescribed by regulation.

(*n*) s. 38 (3) and (4).

The failure of the valuation officer to complete the preparation, revision or settling and signing of the list within the time prescribed by the Act or to include any matter which ought by law to be included in the list will not of itself render the list invalid. Moreover, until the contrary is proved, the list is to be deemed to have been duly made in accordance with the Act (o).

Upon receipt of the settled valuation list it is the duty of the rating authority to deposit it at its offices and thereafter to give effect to any alterations which the valuation officer may properly require them to make (p).

(C) *Alteration of Current Valuation Lists*

Although the current valuation lists were prepared in accordance with the provisions of the Valuation (Metropolis) Act, 1869, and of the Rating and Valuation Act, 1925, their amendment and alteration is now governed by the provisions of the Local Government Act, 1948.

Section 40 of the Act of 1948 provides that any person aggrieved (q) by any of those same matters as are specified by section 36 may at any time make a proposal for the alteration (r) of the list so far as it relates to the hereditament in question. The valuation officer may similarly make a proposal for the alteration of the list at any time.

Form of Proposal

“ Every proposal must

- (a) be made in writing and, except where it is made by the valuation officer, be served on the valuation officer
- (b) specify the grounds on which the proposed alteration is supported
- (c) comply with any requirements of any regulations made by the Minister (s) with respect to the form of proposals and otherwise with respect to the making thereof ” (t).

The Minister has made regulations specifying various forms to be used in making proposals as appropriate (u). The General

(o) s. 38 (6).

(p) s. 39.

(q) See *ante*, p. 592, especially *Grainger v. Liverpool Corporation* [1954] 2 W.L.R. 275.

(r) The alteration of the list includes a reference to the insertion in the list or the omission from the list of any hereditament: s. 144 (9).

(s) The Minister of Housing and Local Government.

(t) s. 41 (1).

(u) Forms of Proposal and Claim Regulations, 1949 (S.I. 1949, No. 2311). There are four forms. Form A, the General Proposal Form; Form B, the Form of Proposal for Treatment as an Agricultural Hereditament; Form C for Treatment as an Industrial Hereditament; and Form D for Treatment as a Freight-Transport Hereditament.

Proposal Form requires the person aggrieved or the valuation officer, as the case may be, to state the alteration proposed and the grounds upon which it is supported. It has been held in *Jolly (Oldham), Ltd. v. Almond (Valuation Officer)* (1951) 44 R. & I.T. 374 (L.T.) that it is not necessary to specify the amount of an alteration proposed. It is sufficient for the form of proposal to indicate whether an increase or reduction of valuation is proposed. It is obviously desirable, however, to specify the alteration proposed with as much particularity as possible in order to enable the valuation officer to give full and exact effect to the proposal, if he thinks it proper to do so.

One proposal may relate to more than one hereditament so long as all the hereditaments to which it relates are comprised in the same valuation list (a).

Proceedings on Proposals

Upon receipt of a proposal, the valuation officer must within seven days serve a copy of the proposal accompanied by a statement of the right to object (b) upon the occupier of the hereditament to which the proposal relates and upon the rating authority (c). There are, however, two exceptions to this requirement:

- (i) No copy of the proposal need be served on the maker of the proposal where the maker is the occupier or is the rating authority.
- (ii) If the proposal is not made by the valuation officer and merely seeks a reduction in the value ascribed to a hereditament, no copy of the proposal need be served on the occupier. This does not, however, excuse service on the rating authority where that authority happens to be the occupier of the hereditament in question.

Where the owner of the hereditament is rated instead of the occupier, then he, too, is entitled to receive a copy of the proposal. He is also entitled to receive a copy of the proposal where the hereditament in question is unoccupied (d).

Within twenty-one days from the service of the copy of the proposal upon them the occupier of the hereditament and the rating authority may serve a notice of objection to the proposal upon the valuation officer. The owner of the hereditament also may serve a notice of objection, although he will not usually have been served

(a) s. 64.

(b) s. 41 (2).

(c) The notice must include a statement of the address to which the objection may be sent to the valuation officer: s. 63 (2).

(d) s. 66.

with a copy of the proposal. If he desires to serve such a notice he must do so within twenty-one days from the service of a copy of the proposal upon the occupier. The valuation officer must within seven days of his receipt of any such notice of objection send a copy thereof to the maker of the proposal (e). He may also give notice of objection himself by serving such notice upon the maker of the proposal within twenty-one days from the date on which the proposal was served upon him (f).

If within the period limited above no notice of objection to the proposal is given, or if every notice of objection that has been given is unconditionally withdrawn, then it becomes the duty of the valuation officer to make such alteration in the list as will give effect to the proposal. Where, however, a notice of objection is given and not withdrawn, then the next step to be taken by the maker of the proposal if he wishes to persist in his proposal is to give notice of appeal. Once notice of objection has been given and not withdrawn the valuation list can thereafter only be altered in pursuance of the directions of a court or arbitrator or by agreement of all the parties entitled to be heard upon the appeal.

Notice of Appeal

When notice of objection to a proposal is given and not unconditionally withdrawn the maker of the proposal may appeal by serving a notice of appeal on the following persons within twenty-one days from the date when he received notification of the objection :

- (i) the person making the objection;
- (ii) the rating authority (g);
- (iii) the valuation officer(g).

The notice of appeal must, of course, be in writing. It is the duty of the valuation officer to inform the clerk to the Local Valuation Panel that notice of appeal has been given (h).

Effect of Alterations made in pursuance of Proposals

Where an alteration is made in pursuance of any proposal, in general it relates back to the commencement of the period of the rate which was current when the proposal was made, in addition to affecting all subsequent rates. Any amount which thereby

(e) s. 41 (3).

(f) s. 41 (4). He cannot, of course, serve notice of objection if he is himself the maker of the proposal.

(g) The rating authority and the valuation officer need not be served twice if they are also the objectors, nor need they serve themselves if they are giving the notice of appeal.

(h) s. 41 (6) and (7). For subsequent procedure, see *infra*, pp. 598 *et seq.*

becomes overpaid or underpaid must be repaid by or paid to the rating authority as the case may be (i).

There are, however, a number of exceptions to this rule. These are :

- (i) the inclusion in the valuation list of a newly erected or constructed hereditament or of an altered hereditament which has been out of occupation on account of structural alteration ;
- (ii) a change in the value of a hereditament caused by structural alterations or by the total or partial destruction of any building or erection by fire or other physical cause ;
- (iii) an alteration made by reason of a hereditament having become or ceased to be an agricultural, industrial or freight-transport hereditament, or a canal or railway hereditament occupied for the non-rateable purposes of the British Transport Commission, or a hereditament occupied by the British Electricity Authority or by an Area Electricity Board ;
- (iv) an alteration necessitated by a change in the proportions in which an industrial or freight-transport hereditament is used for such purposes or in the extent to which a canal or railway hereditament occupied for the purposes of the British Transport Commission is occupied for non-rateable purposes ;
- (v) an alteration necessitated by reason of a property previously rated as a single hereditament becoming rated in parts, or vice versa (k).

In such cases the alteration takes effect from the date of the new occupation or from the date of the event causing the alteration, as the case may be.

The valuation officer may at any time correct arithmetical or clerical errors in the valuation list, but if such alterations do more than affect totals, he must notify the occupier of the affected hereditament and the rating authority of his proposal and allow them a period of fourteen days within which to object (l).

(D) Appeals relating to the Valuation List

The Local Government Act, 1948, abolished the local assessment committees, which were formerly the bodies by whom disputed assessments were first considered, and has substituted local valuation panels in their place (m). It is to local valuation

(i) s. 42 (1) and (3).

(l) s. 43.

(k) s. 42 (2).

(m) s. 33 (1)

courts constituted from such panels that appeals relating to the making and amendment of valuation lists lie.

Local Valuation Panels and Courts

Local valuation panels have been constituted throughout England and Wales in pursuance of schemes approved by the responsible Minister (*n*). Each of these panels has a chairman and not more than two deputy chairmen. Each panel has a clerk and certain other officers and servants. From the numbers of such panels local valuation courts are constituted as often as may be necessary for the purpose of hearing appeals. Every local valuation court consists of three members, the chairman or a deputy chairman of the panel and two other members.

Procedure on Appeal

When the clerk to the valuation panel is notified by the valuation officer, it becomes the duty of the chairman of the panel to arrange for the convening of a court (*o*).

A valuation court must sit in public unless it otherwise orders on being satisfied by any party to the appeal that a public hearing would prejudice his interests. The court has power to take evidence on oath and to administer oaths, but has no power to award costs (*p*).

The following persons are entitled to appear before the court either in person, by counsel, solicitor or representative (*q*) to be heard and to call and examine witnesses before the court:

- (i) the appellant;
- (ii) the valuation officer (if not himself the appellant);
- (iii) the owner or occupier of the hereditament in question (if not himself the appellant);
- (iv) the rating authority (if not the appellant);
- (v) the objector (where the appeal is against an objection and the objector is not one of the above persons).

The appellant has the right to begin and the other parties are heard in such order as the court determines (*r*). Within the above limits it is for each court to determine its own procedure in each case, which lends to the proceedings a comparative informality

(*n*) ss. 45-47. The Minister of Health at the time of the passing of the Act of 1948, now the Minister of Housing and Local Government.

(*o*) s. 48 (1).

(*p*) s. 48 (2).

(*q*) Rating Appeals (Local Valuation Courts) Regulations, 1949 (S.I. 1949, No. 2312), reg. 6. A rating authority may appear by its clerk or other duly appointed officer.

(*r*) *Ibid.*, reg. 7.

such as formerly obtained in proceedings before the assessment committees.

Having heard the parties to the appeal, the court must give its decision, if need be by a majority, and give directions as to the manner in which the hereditament in question shall be treated in the valuation list so as to give effect to the appellants' contentions in so far as they are well founded. The court has, however, no power to direct some alteration in the list totally different from that sought by the appellant. It is the duty of the valuation officer to give effect to the court's directions (s).

Arbitration

The parties who would be entitled to appear and be heard before the local valuation court may by agreement refer their dispute to arbitration in accordance with the provisions of the Arbitration Act, 1950. An arbitrator so appointed has power to give directions in the same way as the court and the valuation officer is similarly bound to give effect to them (t). The parties may, if they wish, appoint the Lands Tribunal as arbitrator (u): such a procedure has the advantage of obtaining the decision of the Tribunal without prior resort to the local valuation court.

Appeal to the Lands Tribunal

Any person who has appeared before the local valuation court and is aggrieved by its decision may appeal to the Lands Tribunal (a). A person who, though entitled to appear before the valuation court, did not in fact do so, has no such right of appeal (b).

Procedure before the Lands Tribunal

The Lands Tribunal was constituted by the Lands Tribunal Act, 1949, to exercise a variety of jurisdictions, including that of hearing appeals from local valuation courts. The Tribunal consists of a President and other members appointed by the Lord Chancellor (c). The jurisdiction of the Tribunal may be exercised by any one of its members (d).

(s) s. 48 (4).

(t) s. 50.

(u) s. 1 (5), Lands Tribunal Act, 1949: procedure on such a reference is governed by the Arbitration Act, 1950, subject to the Lands Tribunal Rules.

(a) s. 49 (1), Local Government Act, 1948, and s. 1 (3), Lands Tribunal Act, 1949.

(b) *Haslam v. Cam (Valuation Officer)* (1950) 43 R. & I.T. 786 (L.T.).

(c) The members must be either barristers-at-law, solicitors or persons experienced in the valuation of land: s. 2 (2) of the Act of 1949.

(d) Two or more members commonly sit together where questions of both law and fact arise.

An appeal from the decision of a valuation court is instituted by sending written notice of appeal (e) to the registrar of the Lands Tribunal. Such notice of appeal must be given within twenty-one days from the date of the decision appealed against and the Tribunal has no power to enlarge this time (f). The form of the notice of appeal requires the appellant to state, *inter alia*, the grounds of appeal and whether he proposes to call an expert witness to support the valuations which he proposes to put before the Tribunal at the hearing. The notice of appeal must be accompanied by a copy of the decision appealed against and a list of the names and addresses of the persons who appeared before the valuation court. It then becomes the duty of the registrar to serve a copy of the notice of appeal upon every person named in the list.

Every person upon whom a notice of appeal is so served and who wishes to appear at the hearing of the appeal must within twenty-one days (g) from the date of the notice of appeal give written notice of his intention to appear to the registrar. Such notice must state:

- (i) whether he intends to appear separately or jointly with some other person;
- (ii) the grounds on which he intends to rely;
- (iii) whether or not he proposes to call an expert witness to give evidence in support of any valuation;
- (iv) the address at which documents may be served on him (h).

Where the net annual value of the hereditament which is the subject of the appeal exceeds £200 the Lands Tribunal Rules provide that the parties shall supply the registrar and each other with written statements of their cases specifying the facts to be proved and the points of law to be raised, together with their valuations of the hereditament in question. A party who, at the hearing of the appeal, seeks to depart from his statement or to rely upon some valuation of which the other parties have not been forewarned, may have to pay the costs of any adjournment to prevent surprise (i).

The Tribunal gives its decision in writing and has power to give any directions which the local valuation court might have given.

(e) Substantially in accordance with Form 3 in the First Schedule to the Lands Tribunal Rules, 1949 (S.I. 1949, No. 2263).

(f) s. 49 (1), Local Government Act, 1948.

(g) There is, however, power to extend this period: see Lands Tribunal Rules, 1949, r. 44.

(h) Lands Tribunal Rules, 1949, r. 9.

(i) *Ibid.*, r. 10. The Lands Tribunal Rules, 1949, contain further matters relevant to rating appeals which it is beyond the scope of this article to consider in detail, such as consolidation of appeals: preliminary points of law: disclosure of documents.

The Tribunal can, however, only deal with the appeal before it. In the absence of cross-appeals by other parties, the Tribunal can only accede to the contentions of the appellant in whole or in part or reject them: it cannot vary the decision of the local valuation court in some other respect at the instance of one of the parties appearing (*k*). The Tribunal has power to make orders for costs in relation to the proceedings before it (*l*).

Appeals from the Lands Tribunal

The decision of the Lands Tribunal is final on matters of fact, but any person aggrieved by their decision as being erroneous in point of law may require the Tribunal to state and sign a case for the decision of the Court of Appeal (*m*). Such an application should be made to the registrar within six weeks of the date of the decision. If on the hearing of the appeal the Court of Appeal give directions for the amendment of the Lands Tribunal's decision, the Tribunal must amend its decision accordingly (*n*).

Fairness and Equality

Under the Union Assessment Committee Act, 1862, "unfairness and incorrectness" (*o*) was a specified ground of objection to the valuation list. It was accordingly held by the courts (*p*) the occupier of a hereditament might validly object to a valuation list upon the ground that his hereditament was unfairly valued in relation to others of the same kind in the list, or upon the ground that one class of hereditament was unfairly valued in relation to another class. Although under the Rating and Valuation Act, 1925, "unfairness" remained a ground of objection to the draft list (*q*), the courts came to reject objections based upon the contention that a particular valuation was against the tone of the list. Thus in *Ladies Hosiery and Underwear Ltd. v. West Middlesex Assessment Committee* [1932] 2 K.B. 679 Scrutton L.J. said (*r*): "The appellants here . . . say that besides the principle of independent valuation, there is another vital principle: that as between different classes of hereditaments, and as between different hereditaments in the same class, the valuation should be fair and equal. I agree, but in my view there is a third important qualification, that

(*k*) *Ellerby v. March* [1954] 3 W.L.R. 53.

(*l*) s. 3 (5), Lands Tribunal Act, 1949.

(*m*) s. 3 (4) and (11), Lands Tribunal Act, 1949.

(*n*) Lands Tribunal Rules, 1949, r. 38 (7).

(*o*) s. 18.

(*p*) *Stirk & Sons, Ltd. v. Halifax Assessment Committee* [1922] 1 K.B. 264; *Double v. Southampton Assessment Committee* [1922] 2 K.B. 213.

(*q*) s. 26 (1).

(*r*) At p. 688.

the assessing authority should not sacrifice correctness to ensure uniformity, but, if possible, obtain uniformity by correcting inaccuracies rather than by making an inaccurate assessment in order to secure uniform error" (s). The words "incorrectness and unfairness" do not appear in the Local Government Act, 1948, so that it is now clear that no objection made merely upon such a ground can now succeed. If the owner or occupier of a hereditament feels aggrieved by the fact that although his own hereditament is correctly valued in the valuation list other comparable hereditaments in the same rating area are under-valued, his only remedy is to seek by objection or proposal to have the values of those other hereditaments increased. He cannot hope to have the valuation of his own hereditament reduced to conform with that of the others, unless he can show that the present valuation is excessive.

(3) THE MAKING OF THE RATE

(A) *The Rate outside the County of London*

The legislation governing the making of the rate outside London is contained in the Rating and Valuation Act, 1925. Both in rural and urban rating areas the rating authority levies a general rate (t). Rural rating authorities may make a special rate for such parts of their rating area as are liable to bear it (u). In an urban rating area where an expense is chargeable separately the rating authority must levy that amount on the part of the rating area affected together with, and as an additional item of, the general rate (a).

Every local authority is required "to make such rates . . . as will be sufficient to provide for such part of the total estimated expenditure to be incurred by the authority during the period in respect of which the rate is made . . . as is to be met out of moneys raised by rates, including in that expenditure any sums payable to any other authority under precepts issued by that authority, together with such additional amount as is in the opinion of the authority required to cover expenditure previously incurred . . . or to meet contingencies or to defray any expenditure which may fall to be defrayed before the date on which the moneys to be received in respect of the next subsequent rate will become

(s) See also *Cardiff Archdiocese Trustees v. Pontypridd Assessment Committee* (1930) 46 T.L.R. 633; *Lilley & Skinner, Ltd. v. Essex County Valuation Committee* (1935) 51 T.L.R. 432; *R. v. Cornwall County Valuation Committee, ex p. Falmouth Rating Authority* [1937] 2 K.B. 222.

(t) s. 2 (1) and (2) of the Act of 1925.

(u) s. 2 (2) and (5), e.g., for every "contributory place" as defined by s. 343 of the Public Health Act, 1936, to raise "special expenses" as defined by s. 308, unless the rate is less than £10 or amounts to less than a penny in the pound: s. 3 (1), Act of 1925.

(a) s. 2 (5).

available (b). The rate may thus be made to cover both past and future expenditure.

The General Rate

Every general rate must be a rate at a uniform amount per pound on the rateable value of each hereditament in the rating area (c), and for this purpose the rateable values contained in the valuation list at the time when the rate is made are conclusive (d).

The general rate is made by resolution of the rating authority and its date is the date of the resolution. The period of the rate must be fixed by the authority. The length of the period is a matter for the authority, but the end of the last rating period must coincide with the last day of the financial year. Moreover, one rating period must be immediately succeeded by another: it is not permissible for there to be gaps between rating periods. The rating period is commonly one of six or twelve months, the rate being payable by instalments at specified times, if the resolution of the rating authority so declares. The rating authority may at any time make a supplementary rate to which the same considerations will apply, if they think it necessary to do so.

Within seven days of the resolution making the rate, the authority must give notice of the rate or it will not be valid (e). Notice may be given in one of the following ways:—

- (i) by affixing notices on or near the doors of churches and chapels in accordance with the Parish Notices Act, 1837;
- (ii) by affixing notices in a public or conspicuous place in each parish affected;
- (iii) by publishing the notice in one or more newspapers circulating in the rating area:

Every hereditament in the rating area, whether liable to be rated or not, must be included in every rate in the rate book which it is the duty of the rating authority to keep (f). The form of the rate book varies with the nature and practice of the rating authority (g). It is the duty of the rating authority to make the rate book available for public inspection (h).

(b) s. 12.

(c) s. 2 (3): an exception is made in favour of differential rating schemes made under s. 64 (2) of the Act.

(d) s. 20 (1).

(e) s. 6 (1).

(f) s. 2 (9).

(g) See Rate Accounts (Borough and Urban District Councils) Order, 1926 (S.R. & O. 1926, No. 1178); Rate Accounts (Rural District Councils) Order, 1926 (S.R. & O. 1926, No. 1123).

(h) s. 60 (1).

Changes of Occupation during the Period of the Rate

A person who is in occupation of a hereditament where the rate is made is liable to pay the whole rate assessed upon him. If his occupation ceases during the period, he becomes liable to pay only such proportion of the whole rate as the total number of days of his occupation bears to the total number of days in the rating period, and he is entitled to recover any sums he has overpaid, except in so far as he recovers them from an incoming occupier.

A person who comes into occupation during a rating period is liable to pay such part of the rate as is attributable to his period of occupation (i).

(B) The Rate within the County of London

The Administrative County of London consists of the City of London, the Metropolitan Boroughs, the Inner and the Middle Temple (j). The London County Council (General Powers) Act, 1949, extended the application of certain sections of the Rating and Valuation Act, 1925, which deal with the general rate to the Metropolis (k) with the result that the law on this topic within the county of London is now substantially the same as that without.

The London County Council raises the moneys which it requires to be met by rates by means of precepts issued to the metropolitan boroughs. The metropolitan boroughs raise the amount of such precepts together with the amount of the precepts issued to them by any other body entitled to do so (l), and their own expenses by means of a general rate. The general rate is technically in two parts the poor rate and the general rate proper. The general rate is now made for a period of twelve months.

Amendment of the Rate

By virtue of section 52 of the Local Government Act, 1948, any rating authority whether within or without the County of London may at any time amend the current or preceding rate. In particular the authority may by amendment correct any clerical or arithmetical errors in the rate or any erroneous insertions, omissions or misdescriptions. It may make additions or corrections to the rate by reason of newly erected or unoccupied hereditaments

(i) s. 4 (4).

(j) s. 1, London Government Act, 1939.

(k) s. 43, and L. C. C. (General Powers) Act, 1949 (Appointed Days) Order, 1950.

(l) e.g., the Receiver of the Metropolitan Police District; the Metropolitan Water Board.

coming into occupation, or of changes in occupation or of single hereditaments becoming rated in parts.

An amendment which would have the effect of altering the value on which a hereditament is rated or of charging to the rate a hereditament not shown, or not separately shown in the valuation list may not, however, be made unless it is made—

- (i) to correct a clerical or arithmetical error; or
- (ii) to bring the rate into conformity with the valuation list; or
- (iii) to bring the rate into conformity with a corresponding proposal made by the valuation officer (m).

If effect is not ultimately given to the valuation officer's proposal and too much or too little rate has been paid in consequence, the excess or deficit must be paid by the rating authority or ratepayer as the case may be.

(4) APPEALS AGAINST THE RATE

The right to appeal against the rate to general quarter sessions was given by the Poor Relief Act, 1601 (43 Eliz. c. 2). The Poor Relief Act, 1743, limited the right of appeal to the "next quarter sessions." By judicial decision this came to mean the next practicable quarter sessions at which an appeal could be lodged. The Act of 1743 also gave quarter sessions the power to amend the rate in lieu of quashing it (n).

The right of appeal to quarter sessions is exercisable by any person aggrieved by the rate or having any material objection to any person or persons being put on or left out of such rate, or to the sum charged on any person or persons therein (o). The occupier of a hereditament is thus entitled to appeal, as is an owner liable for rates (p). It would also appear that an owner who has agreed by contract with the occupier to pay the rates is entitled to appeal (q).

The Extent of the Right of Appeal

Formerly appeal to quarter sessions was the customary method by which the majority of rating disputes were determined. The right of appeal to quarter sessions has, however, been severely

(m) Note, this does not apply to a proposal made by some other person, so long as it remains a mere proposal.

(n) The power to amend was extended to the alteration of assessments other than the appellant's: Poor Rate Act, 1801.

(o) s. 4, Poor Relief Act, 1743.

(p) See s. 11 (8), Rating and Valuation Act, 1925.

(q) The tenant of a hereditament let for a time not exceeding three months is entitled to deduct the rates he pays from his rent: s. 1, Poor Rate Assessment and Collection Act, 1869. His landlord is also entitled to appeal to quarter sessions.

restricted by section 53 of the Local Government Act, 1948, which provides : " No appeal against a rate shall lie to quarter sessions in respect of any matter in respect of which relief might have been obtained . . . by means of an objection to the draft valuation list, or an appeal against that list, or by means of a proposal for the amendment of the current valuation list, or by means of an objection to such a proposal, or by means of an appeal against such an objection." The test now to be applied in determining whether there exists a right of appeal to quarter sessions is therefore : Could the proposed appellant obtain or have obtained the relief which he desires to obtain from quarter sessions by seeking an alteration of the draft list by way of objection, or of the valuation list by way of proposal? If the answer is " Yes," then there is now no right of appeal to quarter sessions.

No dispute as to the proper value of a hereditament can any longer be a matter for the decision of quarter sessions. A dispute as to the technical validity of the rate, the manner of its making or publication (r) is, however, a matter to be determined by quarter sessions, since no redress can be obtained by seeking an alteration of the valuation list. If the rate is not assessed in accordance with the valuation list, appeal still lies to quarter sessions. If it is desired to test the validity of an amendment of the rate, the method is by appeal against the rate if the amendment is made by reason of newly erected or unoccupied hereditaments coming into occupation, or of changes of occupation. If, however, the amendment has been made to bring the rate into conformity with the valuation list, then the true grievance is against the valuation list and not against the rate, and the remedy is by way of a proposal for the alteration of the list and not of an appeal to quarter sessions (s).

If the dispute is concerned with occupation, then in all probability redress can be obtained by a proposal to alter the valuation list, as for instance where a person contends that he is wrongly entered in the valuation list as an occupier. If he obtains an alteration of the list, the rate will be consequentially altered. If, however, the rate were assessed upon a person not entered as occupier in the valuation list, then the remedy would be by appeal to quarter sessions (t).

(r) See *ante*, p. 604.

(s) An amendment to correct a clerical or arithmetical error may or may not be a matter for quarter sessions, depending on the nature of the error which is being corrected.

(t) This does not purport to be an exhaustive analysis, but it indicates the principal instances in which an appeal still lies to quarter sessions.

In view of the fact that the remedy of appeal to quarter sessions is of considerably less importance than it was formerly, it is not proposed to consider the practice or procedure on such appeals (u).

(5) RECOVERY OF RATES

Demand Notes

The initial method by which a rating authority claims payment of the rate is by service of a demand note. Such a demand note need not be addressed to the ratepayer by name but may, if necessary, be addressed to the "owner" or "occupier" of a named hereditament. Service of a demand note may be effected personally, by post addressed to the intended recipient at his last known residence, by delivery to some person at the premises to which it relates or by affixing it to such premises if no person is there (a).

The matters to be stated in a demand note are specified by the Form of Demand Note (London) Rules, 1948 (b), in the case of rating authorities within London and by the Rating and Valuation (Forms of Demand Note) Rules, 1948 (c) in the case of authorities outside London. The principal matters contained in all demand notes are a description of the hereditament, a statement of its rateable value, of the amount of the rate per pound, of the date of its making and of the exact amount payable by the ratepayer. The demand-note also contains a statement of rate services showing how the rate in the pound is made up. The demand note is sufficiently authenticated if signed by the clerk (d) to the authority (e).

The demand may be made at any time and does not necessarily have to be made within the period of the rate (f). The rate becomes payable as soon as it is made and duly published, but no proceedings can be taken to enforce payment until a demand-note has been served and there has been a failure to pay for seven days thereafter (g).

(u) These matters are fully discussed in Ryde on *Rating*, 9th ed., Chap. 31.

(a) s. 55 (1), Rating and Valuation Act, 1925: extended to London by s. 63, Local Government Act, 1948.

(b) S.I. 1948, No. 655.

(c) S.I. 1948, No. 653; see also s. 7, Rating and Valuation Act, 1925.

(d) Defined by s. 68 (1) of the Act of 1925 as "any officer of the authority" authorised by them to act on their behalf, either generally or in relation to any particular matter"; adopted for London by s. 144 (1), Act of 1948.

(e) s. 59 (3), Act of 1925; extended to London by s. 63, Act of 1948.

(f) *Thompson v. Beckenham Borough Rating Authority* [1947] K.B. 802.

(g) s. 12, Poor Relief Act, 1814.

Recovery by Distress

The principal means by which rates may be recovered in the event of non-payment is by distress (*h*). The rating authority proceeds by issuing a complaint to a justice of the peace for a summons requiring the defaulter to appear before two justices to show cause why he has failed to pay the rate (*i*). Upon the hearing of the summons if no sufficient cause for non-payment is shown, the justices may issue a warrant to levy distress upon the goods of the defaulter to satisfy the sum due and any costs that may be awarded (*k*).

Grounds of Objection

The function of the justices upon the hearing of a summons for the issue of a distress warrant is judicial and not merely ministerial (*l*).

It is the duty of the rating authority to prove the service of the summons, that the rate was duly made and published, that the person against whom the summons was issued was assessed at a certain sum and that it has been demanded and not paid (*m*). The production of the book purporting to contain the rate affords prima facie evidence of the due making and publication of the rate, if the rate is made in the form prescribed by law (*n*).

Only a limited number of matters may be raised by the ratepayer to resist the issue of the warrant. He may, of course, seek to disprove any of those matters which it is the duty of the authority to prove. He may thus prove that the rate was not made or published as required by law and is thus a nullity (*o*). If the rate does not show the purpose for which it is made, it is a nullity, but the mere fact that it fails to describe the hereditaments to which it relates with sufficient particularity does not make it a nullity (*p*). Accordingly, the first is a matter which will afford a good defence to the summons, whilst the second will not. Similarly if the note is amended illegally, the persons affected by the amendment may raise the matter as a defence to the summons (*q*). Where, however, the amendment is made in compliance with

(*h*) s. 2, Poor Relief Act, 1601 (43 Eliz. c. 2).

(*i*) s. 12, Poor Relief Act, 1814; s. 8, Distress for Rates Act, 1849.

(*k*) s. 7, Poor Relief Act, 1743.

(*l*) *Potts v. Hickman* [1941] A.C. 212; cf. *Sweetman v. Guest* (1880) 5 Q.B.D. 500 now overruled.

(*m*) *China v. Harrow Urban District Council* [1954] 1 Q.B. 178 at p. 185.

(*n*) s. 18, Poor Rate Assessment and Collection Act, 1869.

(*o*) *R. v. Newcomb* (1791) 4 T.R. 368; *Beeson v. Derby Overseers* (1903) Ryde and Konstam Rat. App. (1894-1904) 328.

(*p*) *R. v. Eastern Counties Ry.* (1856) 5 E. & B. 974.

(*q*) *R. v. Monken Hadley Overseers, ex p. Harnett* (1910) 74 J.P. 169. Mandamus is not the appropriate remedy.

section 52 of the Local Government Act, 1948, it cannot be contended before the justices that the rating authority acted erroneously in making the amendment. Such a contention must be raised either by appeal against the valuation list or against the rate whichever is appropriate (r). Indeed it is in general true to say that whilst the ratepayer may always seek to show before the justices that the rate is a nullity because the rating authority acted illegally and *ultra vires*, he cannot resist the issue of a distress warrant by seeking to show that although the rating authority had jurisdiction to act as it did, it acted erroneously upon the facts (s).

The ratepayer may resist the issue of a distress warrant by showing that there is a defect on the face of the rate in that he is rated in respect of and of which he is not the occupier (t). The justification for the rule is that there is no jurisdiction to rate as occupier a person who is in fact not an occupier. Moreover, the fact that such a contention has already failed upon an appeal against the rate to quarter sessions does not prevent its being put forward again before the justices (u). If the ratepayer is only in occupation of a part of the hereditament for which he is rated, then the rule appears to be that if he can show that he is not in occupation of the hereditament described in the rate book he has a defence to the summons, but if he merely shows that whilst the description in the rate book is correct, he is rated at the wrong amount, then he has no defence. It has been held that the question whether there is beneficial occupation is a question of quantum, not of occupation, and that accordingly it cannot be raised as a defence to the summons (a). It would also appear that the question whether a ratepayer who is admittedly in occupation enjoys some statutory exemption from rates cannot be raised before the justices (b).

A person from whom the full amount of the rate has been demanded, may resist the issue of a distress warrant by showing that he only came into occupation after the date of the rate and so is not liable for the sum demanded (c). Where, however, a person is in occupation both at the date of the rate and when

(r) *Ante*, pp. 595 and 606.

(s) *Shillito v. Hinchliffe* [1922] 2 K.B. 236; *cf. Whinman v. Clark* [1916] 1 K.B. 94.

(t) *Manchester Overseers v. Headlam* (1888) 21 Q.B.D. 96. As to servants, see *ante*, p. 56. This defence will not, of course, avail a person rated as the owner.

(u) *Millard v. Coffin* (1779) 2 Wm.Bl. 1330.

(a) *Churchwardens of Birmingham v. Shaw* (1849) 10 Q.B. 868, but *cf. Mersey Docks v. Cameron* (1865) 11 H.L.C. 443, 462; *Liverpool Corporation v. Chorley Union Assessment Committee* [1913] A.C. 197.

(b) *Churchwardens of Birmingham v. Shaw* (1849) 10 Q.B. 868.

(c) *R. v. Tempest* (1898) 14 T.L.R. 199; *Davis v. Woodfield* (1900) 64 J.P. 215.

demand for the full rate is made and goes out of occupation before the end of the period of the rate, proof of these facts does not afford a total defence, since at the time of the demand he was liable for the full rate. The justices have jurisdiction to calculate the sum due from him and to issue a distress warrant for that amount (*d*).

The above rules illustrate the general principle that if the ratepayer does not show that the rate is a nullity by reason of the failure to observe the necessary formalities in its making and publication, he can thereafter only resist the issue of a distress warrant by establishing that there is some defect on the face of the rate.

A prior unsatisfied demand is a condition for the issue of a distress warrant. Since the Summary Jurisdiction Acts do not apply to the recovery of rates, a summons for a distress warrant does not have to be issued within six months of the failure to satisfy the demand. The summons must, however, be issued within six years of the demand, since section 2 of the Limitation Act, 1939, applies (*e*).

It is, of course, a good defence to show that the sum demanded has been paid. It is also a defence to show that the rate has been satisfied in some other way, as by an overpayment of a previous rate. Moreover, if the rating authority applies for a distress warrant in violation of good faith, the justices may refuse it. Thus in *Leicester Waterworks Co. v. Cropstone* (1875) 44 L.J.M.C. 92, it had been found on arbitration that the ratepayer had made an overpayment. It was held that subsequent rates could not be enforced in full without giving credit for the overpayment (*f*). Justices may not, however, delay the issue of a warrant merely because of the poverty of the ratepayer (*g*).

Where the person summoned is rated as an owner, he may resist the summons by showing that the rating authority had no jurisdiction so to rate him (*h*).

Distress Warrant and Commitment to Prison

If the ratepayer fails to establish a good defence to the summons, it is the duty of the justices to issue a distress warrant to levy the sum due together with any costs allowed. Distress may be levied on the ratepayer's goods anywhere within the county in

(*d*) *Mansel v. Itchen Overseers* [1906] 1 K.B. 221.

(*e*) *China v. Harrow Urban District Council* [1964] 1 Q.B. 178.

(*f*) See also *London & North Western Ry. v. Bedford* (1852) 17 Q.B. 978; *Crook and Willington Rating Authority v. Simpson* [1942] 1 K.B. 592.

(*g*) *R. v. Handsley* (1881) 7 Q.B.D. 398; *cf.* power of rating authority to reduce or remit payment: s. 2 (4), Rating and Valuation Act, 1925.

(*h*) *Forth City Mutual Building Society v. East Ham* [1892] 1 Q.B. 661.

which the rating area is situate, and if sufficient distress cannot be found there, then upon his goods outside the county. Distress must be made for an entire sum and not for fractions of it upon several occasions, but if the person making distress for the whole sum underestimates the value of the goods seized, he may make a further seizure (i).

If sufficient goods upon which to levy distress cannot be found, application may be made to two or more justices for an order committing the defaulter to prison (k). Upon such an application it is the duty of the justices to make inquiry in the presence of the defaulter as to whether his failure to pay the sums to which he was rated and in respect of which the warrant of distress was issued was due either to his wilful refusal or culpable neglect. If they are of opinion that his failure was due to neither of these causes, they may not issue a warrant committing him to prison (l). Even if one of the two causes is established, the justices are not bound to issue the warrant: their power to do so is discretionary (k). Where the justices do not issue a warrant, they may remit the whole or any part of the sum to which the application for committal relates (l). If the justices refuse to issue a warrant, a further application for committal can be made in respect of any sum not remitted on proof that the defaulter's circumstances have changed. If the justices do issue a warrant they may commit the defaulter to prison for any period up to three months unless the sum owing be sooner paid (k). If whilst in prison the defaulter pays a part of the sum owing, then the period of his detention is reduced proportionately (m).

Appeals

The ratepayer against whom a distress warrant is issued has a right of appeal against the distress to the quarter sessions of the county or precinct in which he is rated (n). The right of appeal is not against the issue of the warrant, but against the distress itself, and accordingly there is no right of appeal until the distress had been levied (o). There is, it would seem, no right of appeal against the making of an order of committal to prison for wilful default or culpable neglect in the payment of rates (p).

Any party to the proceedings or person aggrieved by the

(i) *Hutchins v. Chambers* (1758) 1 Burr. 579.

(k) s. 2, Distress for Rates Act, 1849.

(l) s. 10, the Money Payments (Justices Procedure) Act, 1935.

(m) s. 67 (2), Magistrates' Courts Act, 1952.

(n) s. 7, Poor Relief Act, 1743.

(o) *R. v. London JJ.* [1899] 1 Q.B. 532.

(p) *Barton v. Wandsworth Borough Council* (1946) 39 R. & I.T. 122.

decision of the justices upon the hearing of a summons for the issue of a distress warrant may apply for the statement of a case for the decision of the Divisional Court of the Queen's Bench Division on a point of law (*q*). The application cannot be refused unless the justices certify it to be frivolous. The application must be made within fourteen days of the decision and cancels the right of appeal to quarter sessions (*q*).

There is some doubt whether a further appeal lies from the decision of the Divisional Court to the Court of Appeal. The better view is that the decision of the Divisional Court is not a decision in a criminal cause or matter (*r*), and that accordingly such an appeal does lie (*s*).

Remedies other than Distress

Unpaid rates constitute a debt, but that debt cannot be recovered by action, statute having provided that the remedy shall be by distress (*t*). A rating authority may, however, by reason of such a debt petition in bankruptcy (*u*) or for the winding up of a limited company (*a*).

(Concluded)

(*q*) s. 87, Magistrates' Courts Act, 1952.

(*r*) s. 31 (1) (a), Supreme Court of Judicature (Consolidation) Act, 1925.

(*s*) e.g., *Associated Cinema Properties, Ltd. v. Hampstead Borough Council* [1944] 1 K.B. 412. See also *China v. Harrow Urban District Council* [1954] 1 Q.B. 178; cf. *Seaman v. Burlly* [1896] 2 Q.B. 344.

(*t*) *Liverpool Corporation v. Hope* [1938] 1 K.B. 751.

(*u*) *Re McGreavey* [1950] Ch. 150.

(*a*) *Re North Bucks Furniture Depositories, Ltd.* [1939] Ch. 690.

NOTES OF RECENT CASES

1. REAL PROPERTY

By F. R. CRANE, LL.B., Solicitor

Assaf v. Fuwa [1954] 3 W.L.R. 552 (P.C.)

Sale of mortgaged land—competing purchasers—priorities—pre-1926 law—equitable principles.—In this case, which arose in Nigeria, the Judicial Committee of the Privy Council had to apply pre-1926 English law. A mortgaged land to B, who thereby acquired the legal estate; A later contracted to sell to C. Before this transaction was completed A “conveyed” the land to D (who had no notice) and used part of D’s purchase money to pay off B, without, however, taking a re-conveyance of the legal estate. The Judicial Committee held that as the equities were equal that of C, the first in time, prevailed. D had relied on the principle that “a purchaser for value without notice is entitled to the benefit of a legal title, not merely where he has actually got it in but where he has a better right to call for it” (*per* Stirling L.J. in *Taylor v. London and County Banking Co.* [1901] 2 Ch. 231; *Wilkes v. Bodington* (1707) 2 Vern. 598). Their Lordships held, however, this doctrine applicable only where the holder of the legal estate has declared himself a trustee, or joined in the conveyance, or handed over the deeds.

In England today C would have had to register an estate contract under the Land Charges Act, 1925 (ss. 10, 13) to preserve his priority, for D would have obtained from A the legal estate which a mortgagor now retains.

2. TRUSTS

By F. R. CRANE, LL.B., Solicitor

Re Murray, decd. [1954] 3 W.L.R. 521; [1954] 3 All E.R. 129 (C.A.)

Will—condition subsequent—validity of name and arms clause—uncertainty.—“Name and arms” clauses, after a placid and unquestioned career of some 250 years (see 69 L.Q.R. 219 and, for example, *Re Cornwallis* (1886) 32 Ch.D. 388; *Re Hughes* [1943] Ch. 296) have lately fallen upon evil times. As conditions subsequent they have repeatedly been held invalid, on grounds both of public policy and of uncertainty, attracting in the process some forcible judicial disapprobation (*Re Fry* [1952] Ch. 348; *Re Lewis* [1951] 2 T.L.R. 1032; *Re*

Bouverie [1952] Ch. 400; *Re Wood* [1952] Ch. 406; *Re Kersey* [1952] W. N. 541). As a result the editors of Key & Elphinstone, considering it virtually impossible to draft an effective clause, recommend and include a merely precatory precedent (15th ed., vol. 2, p. 784). The objection to these decisions (which connote no sympathy for the control of the living by the dead) is that recognised conveyancing precedents and practice have been overturned. For this reason some satisfaction is to be derived from Evershed M.R.'s reservation of opinion in the instant case, about these recent decisions (none of which reached the Court of Appeal), on the ground that the courts should hesitate long before holding established precedents void for uncertainty (citing *Bromley v. Tryon* [1952] A.C. 265).

Nevertheless in the present case the name and arms clause failed. The Master of the Rolls (with whom Jenkins and Hodson L.JJ. concurred) found the phrase "assume the surname of Murray either alone or in substitution of his or her actual surname" uncertain because (i) the word "assume" in the context was vague and (ii) the words "either alone or in substitution of" needed addition or alteration to cover possible and likely contingencies;—"as a matter of principle, unless the case is clear beyond doubt, I am not satisfied that the court is justified in reading words into, or otherwise remodelling, the clause in order to assist a forfeiture" (3 W.L.R. at p. 529; 3 All E.R. at p. 134). Further, the clauses imposing the obligation and providing for forfeiture, respectively, were not drafted in identical terms. Consequently the clause failed to pass the test laid down in *Clavering v. Ellison* (1859) 7 H.L.C. 707 at p. 725 "the condition must be such that the court can see from the beginning precisely and distinctly, upon the happening of what event it was that the preceding vested estate was to determine."

Testators are unlikely to include name and arms clauses as conditions subsequent if litigation at least to the Court of Appeal is to be an almost inevitable consequence. The alternatives are either to express merely a wish, as suggested in Key & Elphinstone, or to draft the clause as a condition precedent or part of the limitation. It then has a good chance of being effective—see *Re Allen* [1953] Ch. 810. The difficulty here is that if such a condition or limitation is bad the whole gift will fail, however willing the beneficiaries may be to comply.

In the instant case judgment was not reserved because the time limit of one year laid down in the will was near expiry. It seems odd that time should run while litigation is in progress but that it does is a point to be borne in mind when drafting.

Re Hooker's Settlement [1954] 3 W.L.R. 606; [1954] 3 All E.R. 321 (Ch.D.)

Settlement—power of revocation with consent of court—jurisdiction.—A settlement made in 1917 gave the settlor a power of revocation "at any time during her life with the consent of a judge of the Chancery Division of the High Court of Justice. . . ." Danckwerts J. held, following *Re H.'s Settlement* [1939] W. N. 318, that he had no jurisdiction to make an order of consent because an

individual cannot confer jurisdiction on the court, or require it to exercise a discretion. Nor would he make an order on the ground of hardship (as was done in *Re H.'s Settlement, supra*). The learned judge pointed out that revocation—or, of course, consent to revocation—can always be confided to trustees, who are entitled to ask the court for directions if in doubt, and that appropriate precedents were available in 1917.

(K. & E. 15th ed., vol. 2, pp. 688, 689)

Re Burton's Settlements, Scott v. National Provincial Bank Ltd.
[1954] 3 W.L.R. 581; [1954] 3 All E.R. 193 (Ch.D.)

Settlement—condition subsequent—certainty—power of appointment—excessive execution or fraud on power—election—voluntary settlement by appointee.—This case must not be confused with *Re Burton's Settlement Trusts, infra*.—A testator made, *inter alia*, settlements *inter vivos* in 1915 and 1924. By his will and codicil, he executed a power of appointment under the 1915 settlement in favour of his daughters (who were also entitled in default of appointment) and settled his residuary estate on his daughters for life and thereafter on their issue. By clause 11 of the codicil he made the gift of residue subject to the condition that his daughters should “within six calendar months next after my decease . . . or within such further period as my trustees shall think reasonable . . . execute a settlement of the share hereinbefore appointed to her [under the 1915 settlement]” on the trusts of the residuary estate. If a daughter refused the will was to be construed “as if she had not been a daughter of mine”. The testator died in 1932. In 1947 a daughter, on attaining twenty-one, made a settlement, with the intention to comply with the condition, of her interests under the 1915 and 1924 settlements. Actually no appointment had yet been made under the 1924 settlements (there were two) but the testator's widow had power to do so. The National Provincial Bank Ltd. were trustees of all the settlements mentioned.

These comparatively straightforward facts presented Upjohn J. with several legal problems, which are best considered seriatim:—

1. *Validity of the condition subsequent.* This was attacked on the now popular ground of uncertainty. The learned judge, however, held it valid because the event on which the condition was to operate was not uncertain, even though it might be difficult to ascertain if the event had happened, following *Re Gape* [1952] Ch. 473. Reasonable time, he said, was a familiar concept in our jurisprudence and was here readily ascertained because its duration was confided to the discretion of the trustees.

2. *Validity of the appointment made.* The doctrine of fraud on a power declares that “a person having a limited power must exercise it bona fide for the end designed; otherwise the execution is corrupt and void”—*per* Farwell on Powers, 3rd ed. (1916) at p. 457. In *Vatcher v. Paull* [1915] A.C. 372, Lord Parker of Waddington, emphasising that a bargain between appointor and appointee was

unnecessary, said "It is enough that the appointor's purpose and intention is to secure a benefit for himself or some other person not an object of the power"—a statement accepted and followed in *Re Simpson* [1952] Ch. 412 and *Re Dick* [1953] Ch. 343. In *Re Simpson*, consequently, Vaisey J. held that a clear appointment to objects of the power, coupled with a condition subsequent of the present type attached to a gift of residue, amounted to a fraud on the power, because the whole transaction was designed to ensure that non-objects obtained an interest in the appointed funds. In the present case Upjohn J. also reviewed exhaustively the authorities concerning the doctrine of excessive execution of powers, which states that "where there is a complete execution of a power and something added which is improper, the execution is good and the excess void"—*per* Farwell, *op. cit.* at p. 343. This principle has frequently been applied to an appointment followed by an invalid settlement of the appointed funds. The distinction is between a genuine appointment to an object coupled with an attempt to impose conditions, when the former stands and the latter fails, and no genuine appointment but one foreign to the power, when the whole fails as a fraud (3 W.L.R. at p. 592; 3 All E.R. at p. 203, citing from *Re Holland* [1914] 2 Ch. 595; see also *Roach v. Trood* (1876) 3 Ch.D. 429). In the absence of extrinsic evidence of purpose "the mere fact that the appointor purports to attach conditions intended to compel the appointees to settle the fund or make certain payments is not, in my judgment, by itself sufficient to constitute a fraud on the power" (3 W.L.R. at p. 594; 3 All E.R. at p. 204). Consequently *Re Simpson* was not followed, and the appointments in the instant case stood; if a condition attached directly to the appointed funds would only be struck out, the same condition attached to residue could not constitute a fraud.

3. *Election.* (a) As a result of the above decisions, the daughters had the alternatives of settling the appointed funds and taking the residue, or keeping the appointed funds and forfeiting the residue. Had Upjohn J. found the appointment fraudulent, no such election would presumably have been required, because the condition referred only to the "share hereinbefore appointed." But in *Re Simpson*, *supra*, the words used were wider—"share under the said settlement"—and Vaisey J. held the condition there appropriate to catch also the shares in default of appointment. This choice, though termed election, was of course made necessary only by the presence of a valid condition.

(b) True election in equity depends upon a testator giving A's property to B and his own free property to A. Thus a case of election is raised by an appointment to B, a stranger to the power, and a gift of free property to A, an object of the power and entitled also in default of appointment (*Whistler v. Webster* (1794) 2 Ves. 397; Farwell at p. 430). But where there is an appointment to A, an object, with a superadded settlement in favour of B, a stranger, and also a gift of free property to A, the latter does not have to elect. The doctrine of excessive execution strikes out all reference to B, and there are simply two gifts to A (*Roach v. Trood*, *supra*; Farwell at p. 430). It may be noted that this result is strongly criticised in Jarman on *Wills*, 8th ed., vol. 2, pp. 848-85, and Gray on *Perpetuities*,

ed., para. 561, and see *White v. White* (1882) 22 Ch.D. 555). The importance of careful and accurate drafting to give effect to the testator's wishes in such cases is obvious—*Re Neave* [1938] 1 Ch. 793 is an example of an erroneous method.

4. *Destination of residue.* In *Re Simpson, supra*, it was held that a direction to hold the residue, if the condition was not complied with, on such trusts as if the child so refusing had died in the testator's lifetime, resulted merely in an intestacy—so the children took after all. In the instant case Upjohn J. did not consider this particular point, but he did hold that the phrase “as if she had not been a daughter of mine” would not have invalidated the earlier appointment to the daughter in the same instrument. Therefore such expressions seem inapt to achieve the desired result—an actual destination for the funds should be stated.

5. *Settlement by beneficiary.* An actual settlement by an appointee of appointed funds in possession is effective even if he was not bound to make it under the principles already discussed (*Roach v. Trood, supra*). In the instant case the 1947 settlement by the daughter purported also to deal with any funds that might in future be appointed in exercise of the powers in the 1924 settlements. It was argued that any such property would not be caught, there being no consideration, on the basis that equity will not assist a volunteer (see *Re Ellenborough* [1903] 1 Ch. 697). Upjohn J. held, however, that as the daughter's settlement was made with the intent to comply with the condition, her conscience was affected and she could not repudiate; “she made her election once and for all when she executed the 1947 settlement.” Further, the assistance of equity was not required since the trustee, the National Provincial Bank Ltd., already had the funds in its capacity of trustee of the 1924 settlements. There was no assignment, but merely a direction to the Bank to hold the property on new trusts in certain events.

3. CHARITIES

By A. KIRALFY, Barrister-at-Law

Re Lewis, Public Trustee v. Allen [1954] 3 W.L.R. 610;
[1954] 3 All E.R. 251

Relief of physical disability.—A bequest to “10 blind boys and 10 blind girls resident in Tottenham” has been upheld as charitable. *Re Fraser* (1883) 22 Ch.D. 827 was followed, though the substantial point appears not to have been argued in that case. Relief of sickness and suffering is a ground of charity (*e.g.*, *Re Hillier* [1944] 1 All E.R. 480). It forms a recognised classification in the American cases. Is blindness in itself an object of charity? Certainly in youth it is a formidable drawback and requires great additional expense if the youth is to fit himself or herself to earn a livelihood. No doubt a wealthy blind child would not be one of the 20 chosen by the trustees.

Most of the argument and judgment turned on the question whether a gift must be limited to the “poor blind” in a narrow sense. The

court rejected this. The words "aged, impotent and poor" are construed disjunctively and a gift need not be limited to combinations of these elements. The blind and disabled are "impotent" in the sense of the Statute of Elizabeth, and the proper object of care and compassion.

(Theobald 336, 347; Jarman 238)

4. WILLS

By A. KIRALFY, Barrister-at-Law

Re Burton's Settlement Trusts [1954] 3 W.L.R. 574; [1954] 3 All E.R. 231

Will or settlement—construction—Rule in Lassence v. Tierney.—A testator or settlor may make a gift to a beneficiary followed by a trust or direction cutting down that gift. If the latter part of the gift fails to operate the beneficiary's interest is treated as absolute. It is, however, necessary to find some point at which a prima facie absolute interest is conferred. In the instant case trustees were directed to divide the trust fund in two and appropriate each half as the share of one of the settlor's two daughters. These shares were then settled on the daughters for life with gifts over to issue and an accruer clause. No disposition was made for the event which in fact occurred, the death of both daughters without issue. Roxburgh J. held that there was a resulting trust to the settlor. The division into shares was part of the mechanics of administration and not of beneficial devolution. In this part of the law it is difficult to impute a clear intention to a settlor or testator. The problem arises because he has not anticipated what has happened. Can we in fact feel satisfied that an "absolute" gift was intended in any of the *Lassence v. Tierney* cases? If so, is there a real distinction in the present case? An appropriation has, as the learned judge pointed out, satisfied the rule in the past. The express clause negating an absolute interest, again has been held not fatal to the application of the rule. In the circumstances of the case it is no doubt plausible to think that the settlor would prefer his estate to benefit than relatives of his daughters, and this may be used perhaps as an aid to construction.

(Theobald 403, 404; Jarman 1167, 1169, 1170 (c))

5. PLANNING CASES

By T. A. BLANCO WHITE, Barrister-at-Law

Keats v. L.C.C. [1954] 1 W.L.R. 1357; [1954] 3 All E.R. 303

Planning control—enforcement notice—appeal.—In this case, the Divisional Court succeeded in confusing still more the already difficult question: When is it right to appeal against a bad enforcement notice, and when right to ignore it unless and until a prosecution follows? In

the present case, the substantial objection to the notice was, that the act alleged as development was not development, since it was covered by the Town and Country Planning (Use Classes) Order: the original adoption of a use for the land in the same class as the use complained of having taken place more than four years before the enforcement notice was served. The notice itself was somewhat ambiguous: it complained of the use of the land "for the purpose for which the same is now used: namely, as an industrial building." Argued for the occupier of the land: Either this was saying: We complain of use of the land for its present purpose (the answer then being: because of the Use Classes Order, no permission is required); or it was saying: We complain of use as an industrial building (the answer then being: that use started over four years ago, and your notice is out of time). But the court would have none of it, saying: The notice is perfectly clear; it refers to the present use of the land; your objection is (in effect) that the development complained of has not taken place; and this is a matter that cannot be raised on an appeal against an enforcement notice—the justices hearing the appeal must assume that the facts alleged by the notice are true. This attitude (coming as it does from the Divisional Court, which seems so often to claim direct revelation of the intentions of the legislature) may perhaps be called over-technical. The moral of the case, from the landowner's point of view, remains the old moral: always appeal, because there is no way of telling except by appealing whether that is your proper remedy or not.

6. LANDLORD AND TENANT CASES

By J. MUIR WATT, M.A., Barrister-at-Law

Tovey v. Tyack [1954] 3 W.L.R. 570; [1954] 3 All E.R. 216

Rent Restrictions Acts—Landlord and Tenant (Rent Control) Act, 1949—shared accommodation—sharing with landlord or person other than landlord—material time—date of commencement of proceedings.—It was held in this case that the material date for deciding whether the tenant shared living accommodation with his landlord or with a person or persons other than his landlord within the meaning of sections 7 and 8 of the Landlord and Tenant (Rent Control) Act, 1949, was the date of the commencement of proceedings. Thus where a tenant shared living accommodation with his landlord's son but before the commencement of proceedings the landlord had made a gift of his interest to the son, it was held that the tenant at the material time was sharing with his landlord. Consequently he was not protected by section 8 of the 1949 Act. This decision is in harmony with the general principle under the Rent Restrictions Acts that the application of the Acts depends on the position when proceedings are begun.

(Megarry, 7th ed., p. 72; Rent Restrictions Guide, 3rd ed., p. 28.)

King v. Taylor [1954] 3 W.L.R. 669; [1954] 3 All E.R. 373

Rent Restrictions Acts—comparative hardship—county court judge's decision final if some evidence of hardship—effect of change of circumstances between trial and appeal.—The actual decision in this case is not of special importance, as it merely reaffirmed the proposition, clearly stated in *Coplands v. King* [1947] 2 All E.R. 393, that where there is evidence of hardship on both sides the decision of the county court judge as to the comparative hardship (in cases falling within para. (h) of the First Schedule to the 1933 Rent Act) is conclusive. The Court of Appeal did, however, make a useful statement about the effect of a change of circumstances between the trial and the appeal. They distinguished between the cases where the appeal is from the refusal to make an order for possession and the cases where the appeal is from the making of an order for possession. If the county court judge has made an order for possession the circumstances to be considered by the Court of Appeal are those existing at the date of the trial. If, on the other hand, the judge has refused to make such an order and the Court of Appeal are asked to make it the latter court must take account of any change of circumstances between the trial and the appeal. The statement in Megarry (7th ed., p. 270) that "the circumstances to be considered are those existing at the time of the hearing, and the subsequent disappearance of the predominant hardship (*e.g.*, between the hearing and an appeal) does not affect the position" must be understood as applying only to the case where the appeal is from the making of an order for possession. (Megarry, 7th ed., p. 270; Rent Restrictions Guide, 3rd ed., p. 93.)

Etam Ltd. v. Forte [1954] 3 W.L.R. 719; [1954] 3 All E.R. 311

Landlord and Tenant Act, 1954, Sched. 9, para. 8—Landlord and Tenant Act, 1927, ss. 4, 5 and 9—"proceedings pending" at commencement of 1954 Act—reasonableness under 1927 Act.—This case was the first reported case before the Court of Appeal in which a point under the Landlord and Tenant Act, 1954, arose. The case also raised one or two points of interest under the 1927 Act. The following is a summary of the matters dealt with:—

(1) The provision in paragraph 8 of the Ninth Schedule to the Landlord and Tenant Act, 1954, that where, at the commencement of that Act (October 1, 1954) "proceedings are pending" on an application to the tribunal under section 5 of the Landlord and Tenant Act, 1927, no further step in the proceedings can be taken except to make an order as to costs, has no application where a final order has been made by the 1927 Act tribunal and only an appeal is pending. It was, therefore, the duty of the court to consider the appeal on its merits.

(2) On its merits the court agreed with the county court judge that it would not be reasonable to grant a new tenancy.

(3) In considering the question of reasonableness the court held that it was entitled to take into account the fact that the tenant had entered into a covenant not to make a claim under section 4 or section 5 of the Landlord and Tenant Act, 1927.

(4) The court expressed the view that in determining whether a covenant excluding the right to apply under the 1927 Act was made for adequate consideration within section 9 of that Act, the consideration may be sought in matters outside the actual terms of the lease itself, as *Holt v. Lord Cadogan* (1930) 40 T.L.R. 271, indicated. It is for the landlord to show that there is adequate consideration, "adequate" meaning "solid and valuable" (*ibid.*).

(Woodfall, 25th ed., p. 1186.)

Easthaugh v. Macpherson [1954] 1 W.L.R. 1307;
[1954] 3 All E.R. 214

Notice to quit—premises to be vacated "by" a specified date—validity.—A notice to quit, after referring to the tenancy of the premises "which we agreed you should rent until March 31, 1954," went on to say that the landlord must ask the tenant "to accept three months' notice to vacate the office by the date (*i.e.*, March 31, 1954). . . ." The Court of Appeal reversed the county court judge who had held the notice bad on the ground that it purported to terminate the tenancy at midnight on March 30/31, and thus to cut off the last day. Having regard to the document as a whole, and particularly the earlier reference to March 31, 1954, the Court of Appeal concluded that it really meant "accept three months' notice to vacate the office on or before March 31," and that it did not purport to terminate the tenancy at latest at midnight on March 30/31. There appears to be no helpful authority in England on this particular point, although there is authority on the distinction between "on" and "from," and the court derived some assistance from a Canadian case, *J. H. Munro v. Vancouver Properties, Ltd.* [1940] 3 Weekly Western Reports 26. (Woodfall, 25th ed., p. 1045.)

Monson v. Boud [1954] 1 W.L.R. 1321; [1954] 3 All E.R. 228

Agricultural Holdings Act, 1948—definition of agricultural holding—whether tenancy in substance tenancy of an agricultural holding—premises in substance used as retail shop for the sale of horticultural products.—The case of *Howkins v. Jardine* [1951] 1 K.B. 614 laid it down that the Agricultural Holdings Act, 1948, applies, by virtue of section 1, only if the tenancy is in substance a tenancy of agricultural land. It also decided that section 1 of the 1948 Act, despite the use of the word "aggregate," which might suggest the possibility of severing the agricultural from the non-agricultural land comprised in a tenancy, did not allow of severance, and that a tenancy must be either wholly within or wholly outside the Act. The principle of *Howkins v. Jardine* was applied by McNair J. in the present case, and, it is submitted with respect, correctly. He held that the tenancy of the mixed subject-matter with which the case was concerned was not in substance a tenancy of agricultural land, and that, consequently, the 1948 Act did not apply. The tenancy included land used for

horticulture (which taken by itself would be agricultural land within section 94 (1) of the Act) but the main use of the land was for the purposes of a retail shop. The tenancy comprised a shop, conservatory, greenhouses, other horticultural buildings and a cultivated stock garden. The main proportion of the turnover of the business, however, came from the sale of plants and shrubs not grown on the premises but purchased elsewhere. The percentage of the turnover which represented the home-grown produce was very small. McNair J.'s finding was that in substance the premises were being used as a retail shop for the sale of horticultural produce, and that the raising, care and culture of horticultural products on part of the land was merely ancillary to its main use. On this finding the decision that the premises did not constitute an agricultural holding was inescapable. (Jackson's *Agricultural Holdings*, 10th ed., p. 107.)

THE LIBRARY

Snell's Principles of Equity. (24th Edition) by R. E. MEGARRY, M.A., LL.B., Barrister-at-Law and P. V. BAKER, M.A., B.C.L., Barrister-at-Law. Sweet and Maxwell, Ltd. cxix and 600 pp. and index. (£2 5s.)

In this 24th edition the process of reorganising and streamlining Snell has continued. Most of the changes forecast in the preface to the previous edition have been made, the chief ones being new chapters, achieved by combination, on Persons under Disability and on Equitable Remedies; in the latter the section on Injunction has been much improved. As a result the number of chapters has been reduced from twenty-six to seventeen and the text is six pages shorter—a welcome exception to the general habit of growth evinced by textbooks. This edition of Snell will, it is thought, be found a good one; it is comprehensive, accurate and concise, and at the same time readable. The editors have been remarkably successful in maintaining these qualities over so wide a range of topics—perhaps the section on Charitable Trusts may be specially mentioned.

Nevertheless Snell remains, in Mr. Megarry's own phrase, "sternly practical." It is stiff going for the student, and every opportunity for illustration and explanation needs to be taken. One therefore wonders whether the present valuable historical survey of the law concerning Married Women should be reproduced in future editions (apart from points still applicable) or whether this might not be Snell's last word on the subject? If any space can be found, it is suggested that it would be useful to give a brief account of the effect on trusts of land of the 1925 legislation, including the special aspects of trusteeship under the Settled Land Act, 1925, ss. 16, 107; in any event the paragraph on the creation of a strict settlement (p. 93) needs the addition of an account of the trust for sale. Reference to the Land Registration Act, 1925, might be added to the section on the Land Charges Act, 1925 (pp. 55-59). The brief paragraph on the need for certainty in the objects of a trust (pp. 102-3) could be expanded to explain modern multi-object trust. One or two other small points may be noted. The mention of resulting trusts to the settlor on annulment of a marriage (p. 148) needs a cross-reference to the Matrimonial Causes Act, 1950, s. 25—jurisdiction to

vary settlements (p. 195). The legal charge as a method of mortgaging seems insufficiently emphasised and is said to have the same effect as a mortgage by demise (see pp. 347, 364, 381), whereas different legal interests are created (Law of Property Act, 1925, s. 1 (1) (2)). All these points, it will be observed, are related to the editor's major problem of space and do not detract from the worth of the book as a whole.

In his preface the senior editor pays a graceful tribute to his predecessor, the late Mr. H. G. Rivington. This will be echoed by many who, perhaps now reading reviews of Snell, but no longer the book, nevertheless recall their own early struggles with equity and real property.

F. R. CRANE

Income Tax Law and Practice. Twenty-sixth edition. By CECIL A. NEWPORT, F.A.C.C.A., and H. G. S. PLUNKETT, Barrister-at-Law. Sweet & Maxwell, Ltd. xxix, 406 and (index) 29 pp. (27s. 6d.)

Income Tax Maintenance Relief and Agricultural Allowances. By F. E. CUTLER JONES, B.A., C.A. Sweet & Maxwell, Ltd. xvii, 320 and (index) 24 pp. (35s.)

This year *Newport* has had a face-lift and the result is a pleasing improvement. The alteration is not only, however, in its looks: over the years a number of errors and slips has crept in and, so far as we can see, they have for the most part been rectified. We can hardly think that it needs an introduction, for it is undoubtedly the leading elementary practitioner's textbook on the subject. Although we use the word "elementary," we use it merely in the sense that the book does not presuppose any previous knowledge of the subject: on the other hand there is sufficient detail to enable the practitioner to find the answer to most problems and to put him on the correct road in the few remaining other cases. Its special merit is the large number of practical examples. This year there are two new appendices: "Liability of Newly Resident Persons" and "Extra-Statutory Concessions." It is not fair to describe it as a hardy annual, it is an ever-green. Although there is a slight increase in price it is still very good value.

Mr. Cutler Jones's book is a welcome newcomer. It is quite clear that there are still many taxpayers paying unnecessary tax because they do not put in maintenance claims, and the ordinary solicitor ought to know not merely what a maintenance claim is but how to make one, and this book gives him the necessary information: it tells him not merely what the law is and what the official extra-statutory concessions are, but also tells him the attitude adopted by some inspectors in relation to various matters of detail. Its disadvantage is that it is not primarily written for lawyers so that often there are passages of elementary non-tax law which are unsatisfactory. For example, a good deal of Appendix 2, dealing with the Housing Repairs and Rents Act, 1954, is taken up with an account of the Act which most lawyers will regard as unnecessary. On the other hand, Chapter 16 on appeals to the General and Special Commissioners is invaluable to those who have not handled such appeals. It is impossible in many cases to say that the author is right or wrong, for the experience of one man in dealing with inspectors may well differ from another. Thus, although maintenance claims in the case of long leases seem to be more or less universally admitted in practice, our experience is that subscriptions to property owners' associations are not. At any rate, here are the details which enable the practitioner to deal with maintenance claims and agricultural allowances without either making a fool of himself or overlooking important items of expenditure.

E. F. G.

PRECEDENTS

Form 1

Appointment and Settlement on Trust for a person resident outside the Scheduled Territories for the purposes of the Exchange Control Act, 1947, with a view to saving estate duty, the consent of the Bank of England having been obtained (a).

THIS DEED is made the — day of — BETWEEN A of *etc.* Parties.
(hereinafter called “the Settlor”) of the one part and B of

(a) Stamp *ad valorem* on the value of the life interest surrendered and on the value of the shares transferred by the settlor to the trustees. Where under a marriage settlement there is power to appoint a trust fund to the children of a marriage and the parents are desirous of making an appointment in favour of a child who is resident outside the scheduled territories for the purposes of the Exchange Control Act, 1947, or of transferring shares to such a child difficulties arise by reason of the provisions of that Act. Section 5 provides that except with the permission of the Treasury, no person shall, inter alia, make any payment to or for the credit of a person resident outside the scheduled territories. The position is further complicated by section 29 which provides: “(1) Except with the permission of the Treasury, no person resident in the United Kingdom shall settle any property, otherwise than by will, so as to confer an interest in the property on a person who, at the time of the settlement, is resident outside the scheduled territories, or shall exercise, otherwise than by will, any power of appointment, whether created by will or otherwise, in favour of a person who, at the time of the exercise of the power, is resident outside the scheduled territories. (2) A settlement or exercise of a power of appointment shall not be invalid by reason that it is prohibited by this section, except so far as it purports to confer any interest on any person who, at the time of the settlement or the exercise of the power, is resident outside the scheduled territories.”

The restrictions imposed by sections 5 and 29 may result in some hardship to a family, more especially where a parent has several children to provide for, some of whom are resident in the scheduled territories and one or more of whom are not, and it is desired to produce equality between them. While there is no difficulty in the case of those who are so resident, it is not possible to provide for the one or more who are not, with the result that, if nothing is done for the benefit of the child resident outside the scheduled territories, his share of the settled property and of his parents' estate will have to bear estate duty. In such circumstances the Bank of England may sanction an appointment or a gift to a child outside the

etc. and C of *etc.* (hereinafter called “the Trustees”) of the other part.

Recitals:

WHEREAS:—

settlement;

(1) By a settlement (hereinafter called “the Settlement”) made the — day of — BETWEEN D of the first part the Settlor of the second part and X and Y as trustees of the third part (being a settlement made in contemplation of the marriage shortly afterwards solemnised of D and the Settlor) certain investments were settled upon trust for the Settlor and the said D successively for life and after the death of the survivor of them in trust as to the capital and income of the trust premises for all and any the children or child of the said marriage as the said D and the Appointor should by deed appoint and in default of and subject to any such appointment as the survivor should by deed or will appoint

death of
settlor's
husband;

(2) The said D died on the — day of — without having concurred with the Settlor in making any appointment of any part of the trust premises under the joint power in that behalf given to them by the Settlement and the Settlor has not exercised the said power since his death

children
of the
marriage;

(3) There have been — children of the said marriage of whom E (hereinafter called “the Son”) is one

trusteeship;

(4) The Trustees are the present trustees of the Settlement

desire of
settlor to
appoint;

(5) The Settlor is desirous of exercising the said power of appointment in favour of the Son and of appointing to him absolutely the investments specified in the First Schedule hereto (being part of the investments now subject to the trusts of the Settlement) and of releasing her life interest therein

desire to
make a gift
of invest-
ments;

(6) The Settlor is desirous of making further provision for the Son by giving to him for his absolute use and benefit the

scheduled territories upon the terms that no payment is in fact made to such child and that the property appointed or given to the child is vested in trustees resident in the scheduled territories to be retained on his behalf. The above form is intended to give effect to the restrictions commonly imposed by the Bank of England in such a case. Before any such appointment under any settlement is made the consent of the bank must be first obtained and the form of the settlement approved. If an appointment is effected in this form and the settlor lives five years, estate duty will be saved on the funds appointed or transferred.

investments specified in the Second Schedule hereto to which she is absolutely entitled

(7) The Son is for the purposes of the Exchange Control Act, 1947 resident outside the Scheduled territories and the Settlor has applied to the Treasury in accordance with the provisions of the said Act for leave to make the said appointment and release and to give the said shares to the Son

residence of beneficiary outside the scheduled territories.

(8) By permission dated the — day of — the Bank of England pursuant to the powers vested in them by the Treasury under the said Act authorised the Settlor to make such appointment and release and to transfer the said investments specified in the Second Schedule hereto to the Trustees being persons resident in the United Kingdom to hold upon trust for the Son subject as hereinafter provided

permission of the Bank of England;

(9) The Settlor has transferred the said investments specified in the Second Schedule hereto to the Trustees.

transfer of investments.

NOW THIS DEED WITNESSETH as follows:—

1. IN exercise of the power for this purpose conferred on her by the Settlement and of every or any other power enabling her in this behalf the Settlor hereby irrevocably appoints that the investments specified in the First Schedule hereto shall be held by the Trustees in trust for the Son absolutely and the Settlor further appoints that the sum to be brought into hotchpot and accounted for by the Son under the provisions in that behalf contained in the Settlement in respect of the said investments hereby appointed to him shall be the sum of £— (being the value of the said investments at the date hereof).

Operative part.
Appointment.

2. IN consideration of her natural love and affection for the Son the Settlor hereby surrenders and releases to the Son the life interest of the Settlor in the said investments hereinbefore appointed to him to the intent that the Son shall become absolutely entitled thereto.

Release of life interest.

3. THE Trustees shall stand possessed of the investments specified in the Second Schedule hereto upon trust for the Son absolutely.

Trusts.

4. PROVIDED ALWAYS AND IT IS HEREBY DECLARED as follows:—

Restrictions on trustees' powers: disbursements;

(i) Without the authority in writing of the Bank of England

given under the Exchange Control Act 1947 or under any Act or Acts replacing or amending the said Act no payment credit or disbursement out of the said investments specified in the First and Second Schedules hereto or the income thereof (hereinafter together called "the Trust Fund") shall be made to or on behalf of the Son or of any other person or persons whether resident within or without the Scheduled territories.

direction to
accumulate;

(ii) Until such authority is given by the Bank of England as aforesaid the Trustees shall retain and accumulate the income of the Trust Fund at compound interest by investing the same and the resulting income therefrom in any investments hereby authorised and shall hold such investments as an accretion to the Trust Fund (b).

appointment
of trustees.

(iii) No person shall be appointed to be a trustee hereof who is not resident in the United Kingdom.

Powers of
trustees:
to sell;

5. THE Trustees shall have the following powers namely:—

(i) Power at any time or times at their discretion to sell call in and convert into money the Trust Fund or any part thereof.

to invest;

(ii) Power at the discretion of the Trustees to invest the moneys produced by such sale calling in and conversion and any other capital moneys which may be received by the Trustees in the names of the Trustees in any investments authorised by law for the investment of trust moneys (c).

to vary
investments.

(iii) Power at such discretion as aforesaid to vary or transpose such investments for or into others of a like nature.

Power for
trustees to
charge.

6. ANY trustees for the time being hereof being a solicitor or other person engaged in any profession or business shall be

(b) The Bank of England will probably require the income to be accumulated pending an order of the bank sanctioning its release, but it is thought that, since the accumulations will be an administrative measure to give effect to the requirements of the Act, the direction will not necessarily determine with the settlor's death or result in any liability to estate duty should the settlor survive five years and the direction be still in force at the settlor's death.

(c) Under the Exchange Control (Blocked Accounts) Order, 1948 (S.I. 1948, No. 1663) moneys in a blocked account can, in effect, be invested only in government securities which are not redeemable for at least two years from the date of purchase. It would be more convenient if the trustees could invest in trustee securities generally. It may be, however, that the Bank of England will require their powers of investment to be restricted to investments authorised in the case of a blocked account.

entitled to charge and be paid out of the investments specified in the several schedules hereto all usual professional or other charges for business done by him or his firm whether in the ordinary course of business or not and although not of a nature requiring the employment of a solicitor or other professional person.

IN WITNESS, *etc.*

THE FIRST SCHEDULE

[To contain a list of the investments appointed in favour of the Son.]

THE SECOND SCHEDULE

[To contain a list of the investments transferred by the Settlor to the Trustees.]

Form 2

Mortgage of Endowment Policy by way of Collateral Security for Legal Charge on Land.

THIS MORTGAGE is made the — day of — 19— BETWEEN Parties.
A of *etc.* (hereinafter called “the Borrower”) of the one part
and B of *etc.* (hereinafter called “the Lender”) of the other part.

WHEREAS:—

(1) By a Legal Charge (hereinafter called “the Legal Charge”) of even date with and made between the same parties who are parties to this Deed the Borrower in consideration of £X paid to the Borrower by the Lender charged by way of legal mortgage certain freehold property situate at — in the county of — with the payment to the Lender of the said sum of £X with interest thereon at the rate of £Y per cent. per annum

(2) The Borrower is entitled to the policy of assurance hereinafter mentioned and upon the treaty for the Legal Charge it was agreed that the said sum of £X and interest should be further secured in manner hereinafter appearing.

NOW THIS DEED made in pursuance of the said agreement and in consideration of the said sum of £X so paid by the Lender to the Borrower WITNESSETH as follows:—

Recitals:
legal
charge;

agreement
for collateral
security on
policy.

Assignment
of policy.

1. THE BORROWER AS BENEFICIAL OWNER hereby assigns unto the Lender ALL THAT policy of insurance effected in the — Assurance Society in the name of the Borrower payable on the death of the Borrower or on the — day of — whichever shall first happen numbered — for the sum of £A dated the — day of — and under the annual premium of £Z and the said sum of £A assured thereby and all bonuses additions and moneys to become payable thereunder and the full benefit thereof

Habendum.

To HOLD unto the Lender subject to the proviso for redemption hereinafter contained.

Proviso for
redemption.

2. IT is hereby provided that on payment on the — day of — next by the Borrower to the Lender of the principal sum of £X with interest thereon in the meantime at the rate of £Y per cent. per annum [payable and reducible as provided by the Legal Charge] the premises hereinbefore assigned shall at the request and cost of the Borrower be duly reassigned by endorsed receipt or otherwise to the Borrower.

Power of
sale.

3. THE statutory power of sale shall become immediately exercisable by the Lender without the necessity of giving any notice in that behalf to the Borrower at any time or times after the power of sale applicable to the Legal Charge shall have become exercisable and any sale under such power of any policy for the time being subject to this security may be made by way of surrender to the issuing office.

Covenants by
borrower:
that policy
not voidable;

4. THE BORROWER hereby covenants with the Lender (1) that the policy hereby mortgaged is not void or voidable and that the said policy and any new policy to be effected under the provisions hereinafter contained shall not become void or voidable and that the Borrower will not do or suffer anything whereby the Lender may be prevented from receiving the moneys to become payable under any such policy or any part thereof (2) that if the policy hereby assigned or any such new policy as aforesaid has or shall become voidable the Borrower will at his own cost do all things necessary for restoring or keeping on foot the same And that if any such policy has or shall become void the Borrower will immediately at his own cost effect and deliver to the Lender or enable him to effect a new policy or policies maturing on the

to restore
lapsed
policy;

day on which the void policy would have matured if it had been kept on foot for securing the amount (exclusive of profits) which would have been payable under the void policy if the Borrower had died on the day on which such policy became or shall become void And that every new policy and the moneys to become payable thereunder shall be subject to this security and to the power of sale and other provisions conferred by or incident to this Deed in relation to the original policy and the moneys to become payable thereunder (3) that the Borrower will during the continuance of this security duly and punctually pay the annual premium and other moneys (if any) necessary for keeping on foot the policy hereby assured and every such new policy as aforesaid when the same shall become due or within one week thereafter and will forthwith deliver the receipt for every such payment to the Lender And that if the Borrower shall at any time neglect or refuse to make the payments aforesaid or any of them or to deliver such receipt as aforesaid the Lender may pay the same.

to pay
premiums;

[(4) THAT the Borrower will before he goes beyond the limits of the policy hereinbefore assigned or any such new policy as aforesaid give notice in writing to the Lender of his intention so to do And that if the Borrower shall at any time during the continuance of this security go beyond such limits or subject his life to any extraordinary risks not covered by any such policy or if the Lender shall receive notice or shall have reasonable grounds for believing that the Borrower is intending so to do then and in such case the Lender may without any further consent on the part of the Borrower pay any extra premiums payable on any such policy for covering any increased risk or surrender by way of exchange or otherwise for valuable consideration any such policy and may accept in exchange or otherwise effect any other policy on the life of the Borrower in such office for such sum and at such premium and generally subject to such provisions [including provisions allowing the Borrower to travel by land sea or air and with or without restriction as to mode or limits and to reside in any part of the world for his life or any other period and upon any other terms

as to
additional
risks.

providing for any other contingency or extraordinary risk for which the Lender may deem it expedient to provide].]

Power to
deal with
policy.

5. THE Lender may at any time surrender any policy subject to this security in exchange for a fully paid policy or exercise any other options therein and generally may deal with any such policy and make such arrangements with the issuing office as if he were the absolute owner thereof.

Charge of
costs and
expenses.

6. ALL costs charges and expenses properly incurred under this Deed and the Legal Charge in the exercise of the powers therein contained respectively and all moneys properly paid by the Lender shall together with interest thereon at the rate aforesaid be charged on the premises for the time being subject to this security and be deemed to be added to the principal moneys thereby secured for the time being and shall bear interest and be payable accordingly.

Consolida-
tion.

7. THE restriction on consolidation contained in section ninety-three of the Law of Property Act 1925 shall not apply to this security.

IN WITNESS, *etc.*

Form 3

Mortgage of Freehold Farm.

Parties.

THIS LEGAL CHARGE is made the — day of — 19— BETWEEN A of *etc.* (hereinafter called “the Borrower” which expression shall where the context so admits include the estate owner or estate owners for the time being of the property hereby charged) of the one part and B of *etc.* (hereinafter called “the Lender” which expression shall where the context so admits include the person or persons deriving title under him) of the other part.

Recitals:

WHEREAS:—

seisin of
borrower;

(1) The Borrower is seised in fee simple in possession free from incumbrances of the property hereby charged

agreement
for loan.

(2) The Lender has agreed with the Borrower to lend him the sum of £X upon having the repayment thereof with interest thereon at the rate hereinafter mentioned secured in manner hereinafter appearing.

Now in consideration of the sum of £X now paid by the Lender to the Borrower (the receipt whereof the Borrower hereby acknowledges).

THIS DEED WITNESSETH and it is hereby agreed and declared as follows:—

1. THE Borrower hereby covenants with the Lender to pay to the Lender on the — day of — next the said sum of £X with interest thereon in the meantime at the rate of £Y per cent per annum from the date hereof AND FURTHER if the said moneys shall not be so paid to pay to the Lender interest at the rate aforesaid by equal half yearly payments on the — day of — and the — day of — in every year on the principal moneys for the time being remaining due on this security.

Covenant to repay.

2. THE BORROWER AS BENEFICIAL OWNER hereby charges by way of legal mortgage ALL THAT messuage or farmhouse with the outbuildings and the several closes of land known as the — Farm situate in the Parish of — in the County of — and comprising in the whole — acres or thereabouts which premises are more particularly described in The Schedule hereto and are delineated on the plan hereto annexed and thereon coloured — such plan being copied from the ordnance survey map for the district — edition and the numbers in such Schedule referring to the corresponding numbers in the said map and plan WITH the payment to the Lender of the principal money interest and other money hereby covenanted to be paid by the Borrower.

Legal charge.

3. THE Borrower hereby covenants with the Lender as follows:—

Covenants by borrower:

(1) That the permitted use of the property hereby charged for the purposes of the Town and Country Planning Act 1947 is use for the purposes of agriculture or forestry

as to permitted use;

(2) That the Borrower will comply in all respects with (a) the provisions of the Agriculture Act 1947 and any statute amending or re-enacting the same and all statutory instruments rules orders or regulations made thereunder or affecting agricultural land and in particular will farm the land in

to comply with Agriculture and Town Planning Acts;

accordance with the rules of good husbandry or manage the same in accordance with the rules of good estate management and (b) the Town and Country Planning Act 1947 and any other statute or statutory instrument relating to planning control and any order direction or requirement made or condition contained in any permission granted thereunder and will (without prejudice to any statutory indemnity) indemnify the Lender against all proceedings costs expenses claims and demands occasioned by any breach of this present covenant

(3) That the Borrower will not at any time during the continuance of this security without the previous consent in writing of the Lender carry out or suffer to be carried out any development within the meaning of the Town and Country Planning Act 1947 or any statute amending or re-enacting the same and if such consent shall be given will at his own expense apply for any necessary permission of the appropriate planning authority and will not commence or suffer to be commenced such development until he shall have obtained such permission and shall have produced the same to the Lender

to pass on
notices;

(4) That the Borrower will within seven days of the receipt thereof deliver to the Lender full particulars of any notice or order or proposal therefor served or made by a planning authority of which he has notice affecting the property hereby charged and will take all reasonable or necessary steps to comply with such notice or order

to join in
applications;

(5) That the Borrower will at the request of the Lender make or join with him in making such objections representations or appeals in respect of any such notice order or proposal as the Lender may reasonably require and will indemnify the Lender from and against all costs charges expenses claims and demands incurred or paid by the Lender in respect of such objections representations or appeals

costs to be
added to
security;

(6) That all costs charges expenses claims and demands against which the Borrower hereby covenants to indemnify the Lender shall be deemed to be properly incurred by the Lender

to repair
and insure;

(7) That the Borrower will during the continuance of this security keep all messuages buildings and property now or for

the time being comprised in or subject to this security in good and substantial repair and insured against loss or damage by fire [and aircraft] to the full value thereof in the — Insurance Office or in some other insurance office or with underwriters of repute to be approved in writing from time to time by the Lender in the joint names of the Borrower and the Lender and will duly and punctually pay all premiums or other money necessary for effecting and keeping on foot such insurance immediately on the same becoming due or within one week thereafter and will on demand produce to the Lender the policy or policies of such insurance and the receipt for every such payment AND THAT if default shall at any time be made by the Borrower in keeping the said premises or any part thereof in good and substantial repair or in effecting or keeping up such insurance as aforesaid or in producing any such policy or receipt to the Lender on demand the Lender may repair and keep the said premises or any part thereof in repair (with power to enter on the property hereby charged for that purpose but without becoming liable as a mortgagee in possession) or may insure and keep the same insured in any sum not exceeding £—— AND THAT all moneys so expended by the Lender shall be deemed to be properly paid by him AND FURTHER that moneys received on any insurance of the property hereby charged (whether or not effected in performance of this present covenant) shall be applied either in making good the loss and damage or in discharge of the mortgage debt as the Lender may require and that all moneys received under any such last mentioned insurance shall be held by the Borrower in trust for the Lender

(8) That the Borrower will not exercise his powers at common law of leasing or agreeing to lease the property hereby charged or any part thereof and that he will before exercising or agreeing to exercise his statutory powers of leasing or agreeing to lease or let or of accepting surrenders of leases give previous notice in writing to the Lender of his intention so to do and of the proposed rent and terms of such lease or agreement (a)

to give
notice of
leases;

(a) Under para. 2 of Sched. 7 to the Agricultural Holdings Act, 1948, the statutory powers of leasing of a mortgagor of an agricultural holding cannot be taken away. But by s. 99 (6) of the Law of Property

not to
register.

(9) That during the continuance of this security no person shall be registered under the Land Registration Acts 1925–1936 or any statutory amendment or re-enactment thereof as proprietor of the property hereby charged or any part thereof without the consent in writing of the Lender and the costs incurred by the Lender in lodging from time to time a caution against registration shall be deemed to be properly paid by him.

Charge of
expenses.

5. ALL costs charges and expenses properly incurred hereunder by the Lender and all moneys paid by the Lender shall (together with interest thereon at the rate of £Y per cent per annum) be charged on the property for the time being subject to this security and shall on the same being paid be repaid on demand to the Lender by the Borrower with interest thereon from the time of payment at the rate aforesaid and until such demand shall be complied with the Borrower shall pay to the Lender interest at the rate aforesaid on the moneys so paid and for the time being not yet repaid on the respective days appointed for payment of interest on the said principal sum of £X.

IN WITNESS, *etc.*

THE SCHEDULE *above referred to*

[*This will contain the detailed description of the property.*]

Act, 1925, the lease must be at the best rent and no fine be taken. It may, however, be of advantage to the lender to have notice of any proposed lease so that he can, if it does not comply with this provision, apply to the court to have it set aside and for possession—see *Coutts v. Somerville* [1935] Ch. 438.

Form 4

Provision in a Mortgage for payment by the Borrower of the Mortgagee's Costs, including indemnity costs of the Mortgagee in Litigation (a).

ALL COSTS charges and expenses properly incurred [in the exercise of the powers herein contained or otherwise] by the Mortgagee including [the costs of and incidental to the negotiations for and the preparation and completion of this security and (b)] all proper costs charges and disbursements of the mortgagee in actions or proceedings [whether against the Borrower or other persons] for the enforcement or protection of this security or for obtaining payment of the principal and interest hereby charged or any part thereof or for possession of the property hereby charged or for assisting or defending the title of the Borrower or the Mortgagee or otherwise in relation to this security which would be recoverable if the same were taxed as between solicitor and own client and the costs of any compromise in such actions or proceedings shall [but as regards proceedings against the Borrower only if the Mortgagee shall not be refused his costs by reason of misconduct] (together with interest thereon at the rate of £—— per cent. per annum) be charged on the property for the time being subject to this security and shall on the same being paid be repaid on demand by the Borrower to the Mortgagee with interest thereon from the time of payment at the rate aforesaid And until such demand shall be made and complied with the Borrower shall in part payment of such interest pay to the Mortgagee interest at the rate aforesaid on the moneys so paid and for the time being not yet repaid on the respective days hereinbefore appointed for payment of interest on the said principal sum of £—— PROVIDED that the charge hereby conferred shall be in addition to and without prejudice to any and every other remedy lien or security which the Mortgagee may or but for the said charge would have for the moneys secured or

(a) See as to the validity of this provision the article "Mortgagee's Costs," *ante*, p. 149.

(b) The costs of the negotiation etc. of the mortgage are ordinarily deducted from the loan.

any part thereof And the Borrower hereby covenants with the Mortgagee fully to indemnify the Mortgagee against all such costs charges and expenses.

Form 5

Assent by Administrator to himself as statutory next-of-kin of his Wife (a).

I, A of etc. AS PERSONAL REPRESENTATIVE of X late of etc. who died on the — day of — 19— being at her death estate owner in respect of the fee simple in the property described in the Schedule hereto for her own use and benefit absolutely and Letters of Administration to whose estate were on the — day of — 19— granted to me out of the — Probate Registry do hereby assent to the vesting in me of All the property described in the said Schedule for an estate in fee simple

AND declare that I have not made or executed any provision assent or conveyance in respect of the legal estate in the said property or any part thereof.

AS WITNESS, etc.

THE SCHEDULE *above referred to*

[*This will contain particulars of the freehold property.*]

(a) If the estate is less than £20,000 (or £5,000 if there are issue), the surviving husband will take the whole. No question of appropriation of the matrimonial home therefore arises. If there are other statutory next-of-kin entitled a separate agreement for appropriation with their consent should be made, which will bear an ad valorem stamp and will remove the objection to an administrator appropriating in his own favour. The provisions as to appropriation of the matrimonial home in the Intestates Estates Act 1952 do not appear to render this unnecessary. See Form 5, Vol. 17, p. 526. The assent can still be in the above form even if an agreement for appropriation has been made.

Form 6

Lease of Land for Car Park (a).

Drafted by E. H. Bodkin, of Lincoln's Inn

THIS LEASE made the — day of — 19— BETWEEN A Parties
of *etc.* (hereinafter called the Landlord which expression shall
where the context so admits include the estate owner or estate
owners for the time being of the reversion of the premises hereby
demised expectant on the term hereby granted) of the one part
and B of *etc.* (hereinafter called the Tenant which expression
shall where the context so admits include his executors adminis-
trators and assigns) of the other part.

WITNESSETH that in consideration of the rent covenants and Demise.
conditions hereinafter reserved and contained and on the part
of the Tenant to be paid performed and observed the Landlord
doth hereby demise unto the Tenant

ALL THAT, *etc.* Parcels.

TO HOLD the same unto the Tenant from the — day of — Habendum.
19— for the term of — years (b).

YIELDING AND PAYING therefor during the said term the yearly Reddendum.
rent of £X to be paid without any deduction (except Land-
lord's Property Tax) by equal quarterly payments on the four
usual quarter days the first payment to be made on the —
day of — next.

AND the Tenant hereby covenants with the Landlord in manner Tenant's
following that is to say:— covenants:

(1) To pay the rent hereby reserved at the times and in to pay rent;
manner hereinbefore provided without any deduction except as
aforesaid

(2) To pay and discharge all existing and future rates taxes to pay rates
charges assessments impositions and outgoings whatsoever and taxes;

(a) The Precedent can easily be adapted to a lease to a local authority.
Under s. 68 of the Public Health Act, 1925; s. 157 of the Local Govern-
ment Act, 1933, local authorities have power to take on lease land for
a parking place and to make regulations as to the use thereof and the
class of vehicles to use it.

(b) Reservations may be desirable, *e.g.*, rights of access to erect
advertisements on the walls of buildings flanking the park.

(whether imposed by statute or otherwise and whether of a national or local character and whether of the nature of capital or revenue) now or at any time during the said term payable in respect of the demised premises or any part thereof or by the owner or occupier thereof (except Landlord's Property Tax)

to comply
with
statutory re-
quirements;

(3) To execute and do at the expense of the Tenant all such works and things whatsoever as may now or at any time during the said term be directed or required by any national or local or other public authority to be executed or done upon or in respect of the demised premises or any alterations or additions by the owner or occupier thereof

not to make
alterations;

(4) Not at any time (except as herein specifically provided) without the licence of the Landlord first had and obtained to erect or suffer to be erected any new buildings or erections or make any alterations or additions to the demised premises or change the use thereof

to obtain
licences;

(5) Before commencing any of the works or things mentioned in the last preceding covenant [including use as a Car Park (c)] to obtain all necessary planning and other licences and permissions at the Tenant's own cost and to produce the same to the Landlord or his agent and to pay the reasonable fees costs and charges of the solicitor and surveyor of the Landlord in relation to any planning inspection or approval or otherwise in connection therewith

not to commit
breach of
planning
law;

(6) Not to do or omit or suffer to be done or omitted any matter in contravention of the statutes statutory instruments rules orders or regulations for the time being in force relating to planning control or any orders directions or notices made or given thereunder respectively and in particular to comply with the conditions attached to any permission for development (including change of use) granted or to be granted in relation to the demised premises and also at all times (without prejudice to any statutory indemnity in that behalf) to indemnify and keep indemnified the Landlord against all proceedings costs expenses claims and in respect thereof

(c) The words in square brackets throughout should be used if planning permission for a Car Park has not previously been obtained.

(7) Forthwith to give notice to the Landlord of any notice or order or proposal for a notice order served under any statute order regulation or by-law on the Tenant and if so required to produce the same to the Landlord and to make or join in making such representations objections or appeals in respect thereof as the Landlord may reasonably require

to pass on notices;

(8) To use the demised premises only as a Car Park for the class of vehicles specified in the Schedule hereto

to use as Car Park only;

(9) Not to do or suffer to be done on the demised premises any act or thing which in the opinion of the Landlord may be or become a nuisance annoyance or damage to the Landlord or the owners or occupiers of any adjoining or neighbouring property or to the neighbourhood or which may infringe any legislation for the time being in force

not to commit nuisances;

(10) To level form and pave with asphalt gravel or other material suitable for a Car Park the portion of the demised premises actually used for parking vehicles

to pave land;

(11) To provide proper gates and to keep the same closed so as to prevent ingress or egress between the hours of —p.m. and —a.m.

to close at night;

(12) To erect and maintain a good and sufficient fence consisting of an oak park paling of not less than 5 feet or more than 7 feet in height along the boundaries of the demised premises and also to make proper means of access to the highway

to fence;

(13) To put up in a conspicuous position and maintain a notice board specifying the charges to be made for parking and the regulations governing the use of the Car Park

to put up notices;

(14) To provide an attendant at all times when the Car Park is open who shall be responsible for seeing that the Car Park is used in accordance with the foregoing covenants

to provide attendant;

(15) Not to allow any encroachment to be made or easement to be acquired on or over the demised premises

not to allow encroachment;

(16) To pay to the Landlord all costs charges and expenses (including legal costs and surveyor's fees) which may be incurred by the Landlord in or in contemplation of any proceedings under sections 146 and 147 of the Law of Property Act, 1925, or any statutory modification or re-enactment thereof for the time being in force

to pay costs of forfeiture;

not to assign
without
licence.

(17) Not to assign transfer underlet part with or share the possession or occupation of the demised premises or any part thereof (otherwise than by will) without the previous consent in writing of the Landlord but so that such consent shall not be unreasonably arbitrarily or vexatiously withheld.

Landlord's
covenant
for quiet
enjoyment.

AND the Landlord hereby covenants with the Tenant that the Tenant paying the rent hereby reserved and observing and performing the several covenants and conditions herein contained and on his part to be performed and observed shall and may peaceably and quietly hold and enjoy the demised premises during the term hereby granted without any lawful interruption or disturbance from or by the Landlord his successors in title or any person or persons claiming under or in trust for him or them.

Proviso for
re-entry.

PROVIDED ALWAYS and these presents are upon the condition that if the said yearly rent hereby reserved or any part thereof shall at any time be in arrear for 21 days after the same shall have become due (whether any formal or legal demand for the same shall have been made or not) or if the Tenant shall at any time fail or neglect to perform or observe any of the covenants and conditions herein contained and on his part to be performed and observed or if the Tenant while the demised premises or any part thereof shall remain vested in him shall become bankrupt or have a receiving order made against him or enter into any arrangement or composition for the benefit of his creditors or permit any execution to be levied on the demised premises or if the assigns of the Tenant being a Company shall enter into liquidation whether voluntary or involuntary (not being merely a voluntary liquidation for the purpose of amalgamation or reconstruction) then and in such case it shall be lawful for the Landlord or any person or persons duly authorised by him in that behalf into and upon the demised premises or any part thereof in the name of the whole to re-enter and the said premises peaceably to hold and enjoy thereof as if these presents had not been made without prejudice to any right of action or remedy of the Landlord in respect of any antecedent breach of any of the covenants by the Tenant hereinbefore contained.

[PROVIDED further that if any national or local or other public authority (including without prejudice to the generality of the foregoing words any town and country planning authority) shall lawfully refuse permission (or in the case of planning permission any appeal to the Minister by the Tenant shall be dismissed) or shall otherwise prevent the use of the demised premises or any part thereof for a Car Park it shall be lawful for the Tenant to give — months' notice in writing to the Landlord to determine the tenancy hereby created and provided the Tenant shall pay all the rent and perform and observe all the covenants and conditions hereinbefore reserved and contained and on his part to be paid performed and observed up to the date of determination the tenancy shall be determined on the expiration of such notice but without prejudice to any right of action or other remedy of either party in respect of any antecedent breach of any of the covenants and conditions herein contained.]

Proviso for determination on refusal of planning permission.

IN WITNESS, *etc.*

THE SCHEDULE ABOVE REFERRED TO.

[This will specify the class of vehicle allowed.]

Form 7

Conveyance to Sub-purchaser of Part of Building Estate, Restrictive Covenants being Imposed as between the Land Sold and the Remainder of the Land comprised in the Original Contract; the Property Sold being Subject with Other Land in the Original Contract to a Lease, the Rent under which is Apportioned (a).

THIS CONVEYANCE is made the — day of — 19— BETWEEN Parties.
A of etc. (hereinafter called the Vendor) of the first part B of etc.

(a) It frequently happens that a purchaser of an estate wishes to sell off a portion before he has completed his purchase of the whole, and to impose mutual covenants similar to those intended to apply to the remainder of the estate. The covenants by the purchaser will bind the legal estate which he acquires when he completes his purchase, and the benefit of the sub-purchaser's covenants will be validly annexed thereto, notwithstanding he had only an equitable estate under the contract:

(hereinafter called the Purchaser) of the second part and C of etc. (hereinafter called the Sub-purchaser) of the third part.

Recitals:
contract for
sale to
purchaser;

WHEREAS :—

(1) The Vendor is seised in fee simple in possession free from incumbrances of the property hereinafter described and of certain other property all of which he has lately contracted to sell to the Purchaser for the sum of £X subject to a Lease dated etc. and made between etc. whereby the property hereinafter described together with another part of the property comprised in such contract was demised to D for the term of — years from the — day of — at the yearly rent of £Y

no conveyance
executed;

(2) No conveyance to the Purchaser has yet been executed in respect of the said property so lately contracted to be sold to him as aforesaid

contract for
sale of part
to sub-
purchaser;

(3) The Purchaser has agreed with the Sub-purchaser for the sale to him for the sum of £Z of the said property hereinafter described for an estate in fee simple subject to the reservation hereinafter contained and upon the treaty for the said sale it was agreed that the rent reserved by the said Lease should be apportioned as to £A part thereof to the said property hereinafter described and as to £B the residue thereof to the remainder of the property comprised in and demised by the said Lease and that the Purchaser and the Sub-purchaser should enter into the covenants on their respective parts hereinafter contained

purchase-
money to be
paid to
vendor.

(4) A part of the said purchase-money of £X payable in respect of the said sale to the Purchaser exceeding the sum of £Z still remains unpaid and upon the treaty for the sale to the Sub-purchaser it was agreed that the whole of the said purchase-money of £Z should be paid to the Vendor in part satisfaction of the balance of the said purchase-money of £X.

Rogers v. Hosegood [1900] 2 Ch. 388; *Milbourn v. Lyons* [1914] 1 Ch. 35; 2 Ch. 231.

If the Vendor should rescind the contract he would similarly (it seems) have in any case the benefit of the sub-purchaser's covenants and the reservation in his favour. The words "into whosoever hands the same may come" in the above Form will make the intention clear. The reservation of the right of way operates as a re-grant by the sub-purchaser.

NOW THIS DEED WITNESSETH as follows:—

1. IN pursuance of the said agreements and in consideration of the sum of £Z now paid by the Sub-purchaser by the direction of the Purchaser to the Vendor the receipt whereof the Vendor hereby acknowledges and the payment whereof in manner aforesaid the Vendor and the Purchaser hereby respectively acknowledge the Vendor AS BENEFICIAL OWNER at the request of the Purchaser hereby conveys and the Purchaser AS BENEFICIAL OWNER hereby conveys and confirms unto the Sub-purchaser

Conveyance
by vendor
and
purchaser
to sub-
purchaser.

ALL THAT piece or parcel of land situate in the Parish of — in the County of — Containing — acres or thereabouts

Parcels.

TOGETHER WITH the messuage or dwelling-house erected thereon or on some part thereof all which premises with the boundaries and abutments thereof are more particularly delineated on the plan hereto annexed and thereon coloured — TOGETHER also with the right at all times hereafter in common with all other persons who have or may hereafter have the like right to use the roads or intended roads known as — situate on the remaining portion of the said property contracted to be sold to the Purchaser and all sewers drains and water-courses now or hereafter made or passing under or along any of the said roads but subject to the obligation of contributing and paying a due proportion according to his frontage thereto respectively of the expense of making maintaining repairing and cleansing the said roads sewers and drains until the same shall be adopted by and taken into the charge of the local authority such proportion in case of dispute to be decided by the surveyor for the time being of the Purchaser or his successors in title

TOGETHER also with the apportioned part of the yearly rent under the said Lease RESERVING unto the Purchaser and his successors in title or other the owner or owners for the time being of the said property lately contracted to be sold to the Purchaser the right at all times hereafter in common with the Sub-purchaser and his successors in title to use the said roads or intended roads so far as the same lie upon the property hereby assured and all sewers drains and water-courses now or hereafter made or passing under or along any of the said roads

To HOLD all the premises reserved as aforesaid unto the Sub- Habendum.

purchaser in fee simple SUBJECT to and with the benefit of the term created by part of the said Lease and of the rent thereby reserved apportioned to the property hereby assured and all powers and remedies for recovering the same and with the benefit of the covenants on the part of the lessee and the conditions therein contained so far as they relate to the property hereby assured AND SUBJECT also to the covenants and conditions set forth in the Schedule hereto AND SUBJECT further to the provision and declaration next hereinafter contained that is to say

PROVIDED always and it is hereby declared that the Sub-purchaser and his successors in title shall not be entitled to any right of light or air which would in any manner diminish or interfere with the free and unrestricted user of the remainder of the said property lately contracted to be sold to the Purchaser adjoining the said property hereby assured either for building or any other purpose and the assurance hereinbefore contained shall not be deemed or construed to imply the grant of any such right

Covenant by
sub-purchaser
to observe
restrictive
covenants.

2. The Sub-purchaser hereby covenants with the Purchaser with intent to bind the property hereby assured and every part thereof and to the intent that the benefit of this present covenant may be annexed to and run with [the portion of the said property lately contracted to be sold to the Purchaser coloured — on the said plan hereto annexed and every part thereof] [each and every part of the said property lately contracted to be sold to the Purchaser adjoining or near to the property hereby assured] into whosoever hands the same may come to perform and observe the said covenants and conditions set forth in the said Schedule hereto.

Covenant by
Purchaser
to observe
restrictive
covenants.

3. The Purchaser hereby covenants with the Sub-purchaser with intent to bind each and every part of the said property lately contracted to be sold to him adjoining or near to the property hereby assured and to the intent that the benefit of this present Covenant may be annexed to and run with the portion of the said property hereby assured coloured — on the said plan into whosoever hands the same may come to perform and observe such of the covenants and conditions set forth in

the said schedule hereto as do not involve the expenditure of money but so that neither the Purchaser nor his personal representatives shall be liable for the non-observance of the covenants which ought to be observed by the owner for the time being of any part of the said property lately contracted to be sold to him after such part shall have been conveyed to a purchaser subject to this present covenant.

[4. Acknowledgment for production of deeds by Vendor.]

[5. Statement as to value if required.]

IN WITNESS *etc.*

THE SCHEDULE ABOVE REFERRED TO.

[*This will set out the covenants.*]

Form 8

Trust Deed to settle funds upon trust to acquire or maintain premises for the use of old or poor inhabitants.

Drafted by Dr. W. G. H. Cook, of Lincoln's Inn

THIS TRUST DEED is made the — day of — 19— BETWEEN Parties.
 — (hereinafter called “the Founders”) of the one part and
 — (hereinafter together called “the Trustees which expression shall include the survivors or survivor of them or other the Trustees or Trustee for the time being hereof but shall not include a custodian trustee) of the other part.

WHEREAS the Founders are desirous of establishing and maintaining premises at — in the County of — for the purposes and in manner hereinafter appearing and with that object have this day paid over to the Trustees the sum of £— to be held and applied by them upon the trusts and for the intents and purposes hereinafter expressed and declared concerning the same and the Trustees have consented to act as Trustees for the purposes of this Deed.

Recital of
desire to
establish
trust.

Consent of
trustees
to act.

NOW THIS DEED WITNESSETH AND IT IS HEREBY DECLARED as follows:—

Purposes
of trust.

1. THE said sum of £—— together with all donations subscriptions legacies and other moneys which may at any time hereafter be paid to the Trustees for the purposes of the trusts herein declared and the investments for the time being representing the same and the income arising from such investments shall be applied by the Trustees in their absolute discretion in or towards the acquisition and/or maintenance of premises at —— in the County of —— to be used for the benefit of old or impotent or poor inhabitants of [——] and of the neighbouring parishes of —— within the said County.

Investment
of trust
moneys.

2. THE said sum of £—— and the said donations subscriptions legacies and other moneys in the hands of the Trustees shall be invested by the Trustees in their names or in the names of any two of them in any investments authorised by law for the investment of trust funds with power from time to time to vary the same for others of a similar nature PROVIDED ALWAYS that if the Trustees shall purchase or become entitled to any landed property the same may be vested either in the Official Trustee of Charity Lands or in a trust corporation as custodian trustee on behalf of the Trustees as the Trustees shall in their absolute discretion think best.

Number of
trustees.

3. THE Trustees shall consist of two life trustees namely the aforesaid —— and of [——] representative persons one to be appointed by each of the following bodies namely:—

- (a) Bishop of ——
- (b) The Free Church Council of ——
- (c) The Roman Catholic Bishop of ——
- (d) —— and District Trades Association
- (e) —— Rotary Club

PROVIDED ALWAYS that every Trustee so appointed shall to the satisfaction of the other Trustees be either resident in one of the following Parishes namely —— or shall have a special association with at least one of the said Parishes.

Trustees
to sign
declaration.

4. No person shall be entitled to act as trustee under this Trust whether upon his first or any subsequent appointment until he shall have signed a declaration in the minute book of the Trustees to the effect that he accepts the office of trustee and is willing to act in the trusts hereof.

5. EVERY Trustee except the above-named life Trustees shall hold office for a term of [—] years calculated from the date of his appointment.

Trustees to hold office for five years.

6. ANY Trustee who shall be adjudicated a bankrupt or shall become through bodily or mental illness incapacitated to act or who shall communicate in writing to the Trustees his wish to resign shall thereupon cease to be a Trustee.

Incapacity of trustee.

7. UPON the occurrence of a vacancy in the office of a Trustee whether by death or effluxion of time or otherwise the Trustees shall cause notice thereof to be given as soon as conveniently may be to the appropriate appointing body. Any Trustee shall be eligible for re-appointment.

Vacancy.

8. IF upon the occurrence of a vacancy among the Trustees the appropriate appointing body shall fail for a period of two months from the notification by the Trustees of such vacancy to appoint a new Trustee to fill such vacancy then the Trustees shall fill such vacancy by appointing a suitable person to represent such appointing body for the residue of the said period of five years or for the whole of the ensuing period of five years as the case may require.

As to filling vacancies.

9. THERE shall be a quorum when [—] Trustees are present at any meeting. Pending any vacancy or vacancies the Trustees for the time being not being less in number than a quorum may act for all purposes in the administration of the trust.

Quorum.

10. THE Trustees shall hold general meetings at least four times in each year at such times and in such places in the — district or within a convenient distance therefrom as they shall from time to time appoint.

General meetings.

11. THE Chairman or any two Trustees may at any time summon a special meeting for any cause that seems to him or them to be sufficient.

Special meeting.

12. NOTICE in writing of every meeting whether general special or adjourned shall be delivered or sent through the post to each Trustee by the convener or by some other person acting under the directions of the Trustees or, in the case of a special meeting by or under the direction of the person or persons summoning the meeting. Every notice of a meeting shall state the

As to notices.

place day and hour of the meeting and every notice of a special meeting shall further state the matter to be discussed thereat.

Adjournment
if no quorum.

13. If a quorum shall not have assembled within twenty minutes after the time appointed for any meeting the Trustee or Trustees present or the convener may adjourn the meeting. Any meeting may be adjourned by the Chairman upon the adoption of a resolution for its adjournment.

Election of
chairman.

14. THE Trustees shall at their first ordinary meeting in every year elect one of their number to be chairman of their meetings for the current year. They may make regulations for filling his place in case of his death resignation or absence. The Chairman shall always be eligible for re-election.

Majority vote
to control
questions.

15. EVERY matter shall be determined by the majority of the Trustees present and voting on the question. If there is an equality of votes the Chairman shall have a second or casting vote but no Trustee shall in any other circumstances have more than one vote.

Power
to rescind
resolutions.

16. ANY resolution of the Trustees may be rescinded or varied from time to time by the Trustees at a special meeting.

As to
appointment
of sub-
committees.

17. THE Trustees may at any meeting appoint three or more persons from among themselves to be a committee for making any inquiry or for superintending or transacting any business but all acts and proceedings of a committee shall except in cases of urgency be submitted to a meeting of the Trustees for approval.

Appointment
of a con-
vener to act
as secretary.

18. For the purposes of the Trust the Trustees shall appoint one of themselves or some other fit person to be their Convener and such person may also act as their Secretary and/or Treasurer. They may also appoint any other necessary or proper officers and servants to assist them in the administration and management of the Trust. Every appointment so made shall be revocable by the Trustees at their pleasure. The Trustees may pay to their officers and servants (not being trustees) such remuneration as they may decide. The Trustees shall from time to time determine and appoint the duties to be performed by their Convener and their other officers and servants.

Convener to
carry on
trust subject
to com-
mittee.

19. THE Convener shall conduct the correspondence and other business relating to the Trust and shall summon and attend

meetings and shall keep the minutes of all meetings of the Trustees and shall keep the accounts of the Trust.

20. A MINUTE book shall be provided and kept by the Trustees. Minutes of the entry into office of every new Trustee and of all proceedings of the Trustees shall be entered in the minute book and shall be signed by the chairman of the meeting either at the conclusion thereof or at some future meeting after the same shall have been duly confirmed. Minute book.

21. FULL accounts shall be entered in proper account books to be provided for the purpose of all money received and paid respectively on account of the Trust. Such account books shall be made up for each year and shall be examined and passed by the Trustees at their first ordinary meeting in the ensuing year or at some other meeting appointed for the purpose and shall be thereupon signed by the chairman of the meeting. Accounts.

22. A BANKING account for the purposes of the Trust shall be opened and kept at such Bank as may from time to time be selected by the Trustees. Every sum of money received on account of the Trust shall be forthwith paid into the credit of that account unless otherwise expressly ordered by the Trustees. Banking account to be kept.

23. ALL cheques and orders for the payment of money shall be signed by two or more of the Trustees and by the Treasurer and endorsed or countersigned by the Convener or Treasurer. Cheques.

24. THE Trustees shall provide and cause to be deposited with the Bank at which for the time being the Banking Account is kept a fire-proof box or other receptacle wherein shall be kept the deeds muniments vouchers minute books accounts and other documents of or relating to the Trust together with a list in writing of the same signed by the Convener. As to a muniment box.

25. THE Trustees shall have full power from time to time to make regulations which shall be binding on all persons affected thereby for the conduct of the said premises and for the management of the Trust. Trustees to make regulations.

26. ALL the proper costs charges and expenses of and incidental to the administration and management of the Trust shall be defrayed by the Trustees out of the income of the Trust. Subject to the payments aforesaid the income of the Trust shall be applied by the Trustees according to their discretion and in Costs to be defrayed out of income.

such manner as they shall from time to time determine for the purposes mentioned in Clause 1 hereof.

IN WITNESS whereof the parties hereto have hereunto set their hands and seals the day and year first before written.

EXECUTED by the Founders and by the Trustees.

Form 9

Transfer of Registered Land forming Part of a Building Estate (a).

H.M. LAND REGISTRY
LAND REGISTRATION ACTS, 1925 & 1936

COUNTY :

TITLE NUMBER :

PROPERTY :

Dated this — day of — 195—.

1. IN consideration of — pounds (£—) the receipt whereof is hereby acknowledged A B Company, Limited whose registered office is at — (hereinafter called “ the Vendor ”) as BENEFICIAL OWNER HEREBY TRANSFERS to C D of etc. (hereinafter called “ the Purchaser[s] ”) the land shown and coloured — on the plan annexed hereto together with the messuage or dwelling-house erected thereon and known or intended to be known as — being part of the land comprised in the Title above referred to TOGETHER with the benefit of the easements and rights specified in the First Schedule hereto and Subject to the exceptions and reservations specified in the Second Schedule hereto And Subject also to the restrictive covenants set out in the Third Schedule hereto [TO HOLD for themselves as joint tenants beneficially entitled to an absolute interest].

2. The Purchaser[s] himself [themselves] and his [their] successors in title HEREBY [jointly and severally] COVENANT[S] (but not so as to bind himself [themselves] personally after he [they] shall have parted with all interest in the land hereby transferred) with the Vendor and its successors in title for the benefit of the adjoining and neighbouring land now or formerly belonging to the Vendor and all and every part thereof being the remainder of the land now or formerly comprised in the above mentioned Title to observe and perform the restrictive covenants stipulations and restrictions contained in the Third Schedule hereto

(a) See letter at p. 336, *ante*.

3. AND the Purchaser[s] with the consent of the Vendor HEREBY APPLIES [APPLY] to the Registrar to enter the easements and rights set out in the First Schedule hereto against the above-mentioned Title as appurtenant to the land hereby transferred

4. AND the Vendor with the consent of the Purchaser[s] HEREBY APPLIES to the Registrar to enter the exceptions and reservations set out in the Second Schedule hereto against the Title of the Purchaser as appurtenant to the remainder of the land comprised in said Title of the Vendor

5. AND the boundary fences marked "T" within the boundary of the said land are vested wholly in the Purchaser[s] and the boundary fences marked "T" without the boundary are vested wholly in the Vendor and its successors in title AND the Vendor and the Purchaser[s] HEREBY APPLY to the Registrar that such boundary fences be entered on the Register as so vested

6. IT IS HEREBY DECLARED that the Purchaser[s] shall not be entitled to any right of access of light or air or any easement which would restrict or interfere with the free use for building purposes of any of the said adjoining or neighbouring land now or formerly belonging to the Vendor or its predecessors in title or any person or persons deriving title under them.

7. IT IS HEREBY CERTIFIED that the transaction hereby effected does not form part of a larger transaction or of a series of transactions in respect of which the amount or value or the aggregate amount or value of the consideration exceeds £500 [£3,000] [£3,500].

THE FIRST SCHEDULE above referred to
(Easements and Rights)

THE SECOND SCHEDULE above referred to
(Exceptions and Reservations)

THE THIRD SCHEDULE above referred to
(Usual Estate Covenants)

Form 10

Provision in a will for the Testator's Wife and Daughters to reside in a house without making them tenants for life.

1. I devise and bequeath all the real and personal property whatsoever and wheresoever of or to which I shall be possessed or entitled at my death or over which I shall have a general power of appointment or disposition by will (except property otherwise disposed of by this my will or any codicil thereto) UNTO my Trustees UPON TRUST that my Trustees shall sell call in and convert into money the said real and personal property at such time or times and in such manner as they shall think fit (but as to reversionary property not until it falls into possession unless it shall appear to my Trustees that an earlier sale would be beneficial) with power to postpone the sale calling in and conversion of the whole or any parts of the said property during such period as they shall think proper and to retain the same or any part thereof in its actual form of investment without being responsible for loss AND I direct that the income of such of the same premises as for the time being shall remain unsold (including the income of property subsequently required for payment of my funeral and testamentary expenses and debts and the legacies and duties in payment whereof the proceeds of such sale calling in and conversion are hereinafter directed to be applied) shall as well during the year after my death as afterwards be applied as if the same were income arising from investments hereinafter directed to be made of the proceeds of sale thereof and that no reversionary or other property not actually producing income shall be treated as producing income for the purposes of this my will.

Devise and bequest of residue on trust for sale.

2. My Trustees shall out of the moneys to arise from the sale calling in and conversion of or forming part of my said personal property (other than and except income from any part thereof produced previously to such sale calling in and conversion) pay my funeral and testamentary expenses and debts (including all estate duty leviable at my death in respect of my residuary estate) and debts and the legacies given by this my will or any codicil thereto and all death duties and other

Trust to pay debts, etc.

moneys which under or by virtue of any direction or bequest free of duty contained in this my will or any codicil thereto are payable out of my general personal estate and make provision for the payment of any annuities hereby or by any codicil hereto bequeathed by me AND in relation to such payments the rule of equity called the rule in *Allhusen v. Whittell* shall be disregarded.

Investment.

3. MY Trustees shall at their discretion invest the residue of the said moneys in or upon any of the investments hereinafter authorised with power to vary or transpose such investments for others of a nature hereby authorised.

Trustees to permit wife and daughter to reside.

4 (1) Without prejudice to the trust for sale hereinbefore contained and the immediate binding nature thereof it is my express wish that my Trustees shall permit my said wife to reside during her life free of rent rates and taxes in — House or any other dwelling-house in which I may reside at my death until the same shall be sold [and after her death shall permit such of them my daughters A and B as shall for the time being be spinsters to reside in the same on the like terms and conditions] AND I declare that my Trustees shall be solely responsible for the repair and insurance or the rent and covenants in the lease of the said premises while my said wife [or daughters or either of them] shall reside therein as aforesaid [and may expend any moneys out of the capital of my residuary estate for the reconstruction or structural alteration thereof if they shall think proper] (a).

Consents to sale.

(2) The trust for sale hereinbefore declared of my residuary estate shall not be exercisable as regards the premises aforesaid without the consent in writing of my said wife during her life [and after her death of such of them my said daughters A and B as shall for the time being be spinsters.]

5. Trusts of residue for wife for life [and settling daughters' shares.]

(a) A binding direction to the trustees to permit the wife to reside might be held to override the trust for sale.

Form 11

Sale of Freehold House where the purchase-money is intended to be paid by instalments without interest (a).

Drafted by E. H. Bodkin of Lincoln's Inn

I. AGREEMENT FOR SALE

AN AGREEMENT made the — day of — 19— BETWEEN Parties.
A of etc. (hereinafter called the Vendor) of the one part and
B of etc. (hereinafter called the Purchaser) of the other part
WHEREBY it is agreed as follows:—

1. THE Vendor shall sell and the Purchaser shall purchase Agreement for sale.
for the sum of £X ALL THAT messuage or tenement with
the garden [garage and outbuildings] thereunto belonging
known as No. — Street — in the County of —
all which premises are delineated on the plan hereto annexed
and thereon coloured — for an estate in fee simple in possession free from incumbrances.

2. The sum of £Y part of the purchase-money having Purchase-money to be lump sum with power to pay by instalments.
been already paid by the Purchaser to Messrs. — as
stakeholders as a deposit the balance thereof shall (subject
as hereinafter provided) be paid by the Purchaser to the Vendor

(a) The object of this scheme from the Vendor's point of view is to avoid deduction by the purchaser of income tax on the interest which would ordinarily be payable on the unpaid balance for the time being. It is, of course, somewhat unfair on the purchaser, who has to pay the instalments in full without being able to deduct income tax; and it is only because of the present seller's market and the difficulty of raising money that he would accept it. Nevertheless it is believed that the scheme is now in fact employed in some cases. The fact that the instalments amount to more than the purchase-money would be if paid down in cash does not, it is submitted, render the transaction unfair as the Vendor is taking a risk, nor does it render the increase interest. Under the above Precedent the Revenue cannot seek to dissect the instalments into principal and interest as the purchaser has agreed to buy for the same total sum, see *Perrin v. Dickson* [1930] 1 K.B. 107. He will, however, obviously not elect to pay the purchase-money down and the Vendor would not object if he did, so there is no harm in framing the agreement as above.

The Vendor will be getting back an antecedent debt for the purchase-money, so the sale cannot be treated as made in consideration of an annuity, in which case the whole would be subject to income tax—*I. R. C. v. Ramsay*, 20 T.C. 79; *Scoble v. Secretary of State for India* [1903] A.C. 299; *Sothorn-Smith v. Clancy* [1941] 1 All E.R. 111.

or as he shall direct on the — day of — next (hereinafter called the date of completion) at the office of Messrs. — aforesaid at which time and place the purchase shall be completed PROVIDED that if the Purchaser shall give to the Vendor — days' notice in writing expiring — days before the date of completion of his desire to pay the balance of the said purchase-money by instalments the Vendor will accept such payment and the said balance shall be paid and secured in manner following that is to say the said balance shall be paid by equal half yearly instalments of £Z each payable on the — day of — in each year but (subject as hereinafter provided) without interest on the portion of the purchase-money for the time being remaining unpaid the first instalment to be paid on the date of completion but if the Purchaser shall make default in payment of any instalment or any part thereof for 30 days after the same shall have become due the whole of the unpaid instalments with interest thereon at the rate of £A per cent. per annum (b) from the date of completion up to the date of payment shall become immediately due and payable.

The payment of the unpaid instalments and interest shall be secured on the property by a charge by way of legal mortgage to be prepared by the Vendor at the expense of the Purchaser and to contain such powers and provisions and to be in such form as the Vendor shall reasonably require and to be executed immediately after the execution of the conveyance and so long as any money remains owing on the security of the said legal charge the Vendor shall retain possession of the title deeds including the conveyance to the Purchaser.

3. If from any cause whatever other than the wilful default of the Vendor the purchase shall not be completed on or before the date of completion the Purchaser shall pay to the Vendor interest on the balance of the purchase-money (or if he shall elect to pay the purchase-money by instalments on the whole

Interest on
purchase-
money on
failure to
Complete.

(b) This is necessary to enable the Vendor to bring himself within s. 7 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, under which default in payment of interest is required, default in payment of capital being insufficient to allow him to exercise his powers as mortgagee.

of the instalments for the time being due and unpaid) at the rate of £A per cent. per annum from that day until the actual completion of the purchase and shall not be entitled to any compensation for the Vendor's delay or otherwise but this stipulation is subject to the Vendor's rights under any of the — Conditions of Sale PROVIDED that if the delay in completion shall arise from any cause other than the default or neglect of the Purchaser and if he shall at his own risk pay the balance of the purchase-money or of the unpaid instalments thereof into a bank on a deposit account bearing interest at the current rate and shall give written notice thereof to the Vendor or his solicitor interest on such purchase-money shall not be payable by the Purchaser after the date of such notice at a higher rate than that allowed by the bank except during any delay thereafter occasioned by the neglect or default of the Purchaser.

4. The property is sold on the footing that the permitted use thereof is as a single private dwelling-house and curtilage [including garage].

Permitted use.

5. The Vendor is selling as beneficial owner.

Vendor's capacity.

6 The title shall commence with, etc.

Commence-ment of Title.

7. Vacant possession shall be given on completion.

Vacant possession.

8. This agreement shall be deemed to incorporate the — Conditions of Sale (a copy whereof is hereunto annexed) so far as the same are applicable to a sale by private treaty but so that in case of any variation or inconsistency the provisions of this agreement shall prevail.

Incorporation of General Conditions.

AS WITNESS, *etc.*

II. CONVEYANCE

THIS CONVEYANCE is made the — day of — 19— Parties.
BETWEEN A of etc. (hereinafter called the Vendor) of the one part and B of etc. (hereinafter called the Purchaser) of the other part.

WHEREAS the Vendor is the estate owner in respect of the fee simple of the property hereby assured for his own use and benefit absolutely free from incumbrances and has agreed with

Recital of seisin of Vendor, and agreement for sale.

the Purchaser for the sale to him for the sum of £X of the fee simple in the same property free from incumbrances

Conveyance.

NOW THIS DEED WITNESSETH as follows:—

1. In pursuance of the said agreement and in consideration of the sum of £X on or before the execution hereof paid by the Purchaser to the Vendor (the receipt and payment whereof the Vendor hereby acknowledges) the Vendor AS BENEFICIAL OWNER hereby conveys unto the Purchaser

Parcels.

ALL THAT, etc.

Habendum.

To HOLD unto the Purchaser in fee simple.

2. [Acknowledgment and undertaking as to documents.]

3. [Statement as to value.]

IN WITNESS, etc.

III. LEGAL CHARGE

Parties.

THIS LEGAL CHARGE is made the — day of — 19— BETWEEN B of etc. (hereinafter called the Borrower which expression shall where the context so admits include the estate owner or estate owners of the property hereby charged) of the one part and A of etc. (hereinafter called the Lender which expression shall where the context so admits include his executors administrators and assigns) of the other part.

Recitals;
seisin of
Borrowers.

WHEREAS (1) The Borrower is the estate owner in respect of the fee simple of the property hereby charged for his own use and benefit absolutely free from incumbrances.

Debt to
Lender.

(2) THE Borrower is indebted to the Lender in the sum of £X and it has been agreed that the repayment thereof should be secured in manner hereinafter appearing.

NOW THIS DEED WITNESSETH and it is hereby agreed and declared as follows:—

Covenant to
pay by
instalments.

1. THE Borrower hereby covenants with the Lender to pay to the Lender the said sum of £X by equal half yearly instalments of £Y each whereof the first shall be paid on the execution hereof and a subsequent instalment on every — day of — and — day of — in each year but (subject as hereinafter provided) without interest on the instalments of the said sum of £X for the time being remaining unpaid PROVIDED that if

the Borrower shall make default in payment of any instalment or any part thereof for 30 days after the same shall have become due or the statutory power of sale applicable hereto shall otherwise become exercisable the whole of the unpaid instalments with interest thereon at the rate of £Z per cent. per annum from the date hereof up to the date of payment shall become immediately due and payable PROVIDED ALSO that the Borrower may on any day hereby appointed for payment of an instalment [upon giving at least one calendar month's notice in writing to the Lender of his intention so to do] pay off all or any of the instalments unpaid and such partial payment by anticipation shall not affect the payment in regular course of the instalments subsequently payable but shall only have the effect of accelerating the ultimate payment of the said sum of £X (c).

2. THE BORROWER AS BENEFICIAL OWNER hereby charges by Legal Charge.
way of legal mortgage

ALL THAT, *etc.*

With the payment to the Lender of the principal money interest and other money hereby covenanted to be paid by the Borrower.

3. Borrower hereby covenants with the Lender that (a) the permitted use of the property hereby charged for the purpose of the Town and Country Planning Act, 1947, is as a single private dwelling-house and curtilage [including garage] Covenants as to permitted use and tenancies.

(b) the Borrower has not previously to the date hereof granted or purported or agreed to grant any lease or tenancy of the said property or any part thereof AND if the Borrower shall have committed any breach of either branch of this covenant the statutory power of sale applicable hereto shall be exercisable as at the date of this Deed without the necessity of giving any notice to the Borrower.

4. THE Borrower further covenants with the Lender as follows:— Covenants by Borrower;

(1) That the Borrower will comply in all respects with the provisions of the Town and Country Planning Act, 1947, and To comply with planning law;

(c) If completion is delayed, the first payment will be expressed to be payable on the date for completion, not on the execution of the legal charge.

any other statute or statutory instrument order or regulation for the time being in force relating to planning control and any order direction or requirement made thereunder and also any condition contained in any planning permission granted and will (without prejudice to any statutory indemnity) indemnify the Lender against all proceedings costs expenses claims and demands occasioned by any breach of this present covenant.

Not to carry
out develop-
ment;

(2) That the Borrower will not at any time during the continuance of the security without the previous consent in writing of the Lender carry out or suffer to be carried out any development within the meaning of the Town and Country Planning Act, 1947, or any statute amending or re-enacting the same and if such consent shall be given will at his own expense apply for any necessary permission to the appropriate planning authority and will not commence or suffer to be commenced such development until he shall have obtained such permission and shall have produced the same to the Lender.

To pass on
Notices;

(3) That the Borrower will within seven days of the receipt thereof deliver to the Lender full particulars of any notice order or proposal therefor served or made by any planning authority of which he has notice affecting the property hereby charged and will take all reasonable or necessary steps to comply with such notice or order.

To join in
applications;

(4) That the Borrower will at the request of the Lender make or join with him in making such objections representations or appeals in respect of any such notice order or proposal as the Lender may reasonably require and will indemnify the Lender from and against all costs charges and expenses incurred or paid by the Lender in respect of such objections representations or appeals.

charge of
expenses;

(5) That all costs charges expenses claims and demands against which the Borrower hereby covenants to indemnify the Lender shall be deemed to be properly incurred by the Lender.

to repair
and insure;

(6) That the Borrower will during the continuance of this security keep the messuage buildings and property now or for the time being comprised in or subject to this security in good and substantial repair and insured against loss or damage by

fire to the full value thereof in the — Insurance Office or in some other insurance office or with underwriters of repute to be approved in writing from time to time by the Lender in the joint names of the Borrower and the Lender and will duly and punctually pay all premiums or other money necessary for effecting and keeping on foot such insurance immediately on the same becoming due or within one week thereafter and will on demand produce to the Lender the policy or policies of such insurance and the receipt for every such payment AND that if default shall at any time be made by the Borrower in keeping the said premises or any part thereof in good and substantial repair or in effecting or keeping up such insurance as aforesaid or in producing any such policy or receipt to the Lender on demand the Lender may repair and keep the said premises or any part thereof in repair (with power to enter on the property hereby charged for that purpose but without becoming liable as mortgagee in possession) or may insure or keep the same insured in any sum not exceeding £— AND that all moneys so expended by the Lender shall be deemed to be properly paid by him AND further that moneys received on any insurance of the property hereby charged (whether or not effected in pursuance of this present covenant) shall be applied either in making good the loss and damage or in reduction of the mortgage debt as the Lender may require and that all moneys received under any such last-mentioned insurance shall be held by the Borrower in trust for the Lender.

(7) That during the continuance of this security no person shall be registered under the Land Registration Acts, 1925-36, or any statutory amendment or re-enactment thereof as proprietor of the property hereby charged or any part thereof without the consent in writing of the Lender and the costs incurred by the Lender in lodging from time to time a caution against registration shall be deemed to be properly paid by him. not to register;

5. The Borrower shall not exercise his powers (whether by statute or apart from statute) of leasing or agreeing to lease or of accepting or agreeing to accept a surrender of a lease Restriction on leasing.

without the consent in writing of the Lender which need not be expressed in any such lease agreement or surrender.

Charge of
expenses.

6. ALL costs charges and expenses properly incurred hereunder by the Lender and all moneys properly paid by the Lender shall (together with interest thereon at the rate of £Z per cent. per annum) be charged on the property for the time being subject to the security and shall on the same being paid be repaid on demand by the Borrower to the Lender with interest thereon from the time of payment at the rate aforesaid.

IN WITNESS, *etc.*

Form 12

Conveyance subject to a Legal Charge, the Chargee joining to Release the Vendor in Consideration of Covenants by the Purchaser (a).

(Drafted by Niul Hogg, Barrister-at-Law)

THIS CONVEYANCE is made the — day of — 19— BETWEEN Date.
A B of etc. (hereinafter called “ the Vendor ”) of the first part; Parties.
C D of etc. (hereinafter called “ the Chargee ”) of the second
part; and E F of etc. (hereinafter called “ the Purchaser ”)
of the third part.

WHEREAS : —

Recitals:

(i) The Vendor is seised of the property hereby assured for an of seisin;
estate in fee simple in possession subject to the legal charge
hereinafter mentioned but otherwise free from incumbrances;

(ii) By a legal charge (hereinafter called “ the Charge ”) of of the charge
even date with but executed and intended to take effect imme-
diately prior to these presents and made between the Vendor
of the one part and the Chargee of the other part the Vendor
as Beneficial Owner charged the property hereby assured by
way of legal mortgage with the payment to the Chargee of the
principal sum of £X together with interest thereon at the rate
of 5 per cent. per annum as therein provided and other money
by the Vendor therein covenanted to be paid (b) And no payment and of the amounts outstanding;
has yet been made in respect of such principal interest and
other money the full amounts whereof remain outstanding;

(iii) The Vendor has agreed with the Purchaser for the sale of the agree-
ments for
sale subject
to the
charge;
to him of the property hereby assured in fee simple in possession
subject to the Charge but otherwise free from incumbrances
for the sum of £Y;

(iv) The Chargee has agreed to join in these presents in the of the agree-
ment of the
Chargee to
join.
manner hereinafter appearing;

(a) An article by Mr. Hogg explaining the purpose of this and the next
two forms will be found on page 390.

(b) These words are inserted to cover insurance payments, etc.

Testatum.

NOW THIS DEED WITNESSETH as follows:—

Receipt of
purchase-
money.

Conveyance.

Subject to
the Charge.

Release by
the Chargee
of the
Vendor from
his covenants
in the
Charge.

Covenants
by the
Purchaser to
perform and
observe the
covenants
and con-
ditions in
the Charge.

Indemnity of
the Vendor
by the
Purchaser.

1. IN pursuance of the said agreement for sale and in consideration of the sum of £Y now paid by the Purchaser to the Vendor (the receipt whereof the Vendor hereby acknowledges) and of the covenants by the Purchaser hereinafter contained the Vendor as BENEFICIAL OWNER hereby conveys unto the Purchaser ALL THAT the property described in the schedule hereto TO HOLD the same UNTO the Purchaser in fee simple subject to the Charge but otherwise free from incumbrances.

2. IN consideration of the covenants by the Purchaser next hereinafter contained and in order to absolve the Vendor personally but not so as to prejudice the right of the Chargee to enforce the same against the estate owner or estate owners for the time being of the fee simple of the property hereby assured the Chargee hereby releases the Vendor from the obligation to pay all or any of the moneys whether principal interest or otherwise secured by the Charge or to perform or observe all or any of the covenants and conditions contained in or implied by the Charge and from all claims and liability in respect thereof as though the Vendor had never been a party to the Charge.

3. IN consideration of the premises the Purchaser hereby covenants with the Chargee that the Purchaser will perform and observe all the covenants (other than those by the Chargee) (c) and conditions contained in the Charge and in particular that the Purchaser will pay to the Chargee on the — day of — next the sum of £X secured by the Charge with interest thereon from the date hereof at the rate of 5 per cent. per annum And if the whole or any part of the said sum shall remain unpaid pay to the Chargee as well after as before any judgment interest at the rate aforesaid on such unpaid sum by equal half-yearly payments on the — day of — and the — day of — in every year.

4. IN consideration of the premises the Purchaser hereby covenants with the Vendor by way of indemnity only and not further or otherwise that the Purchaser or his successors in title

(c) If the Charge does not contain any covenants by the Chargee the words in brackets should be omitted.

will henceforth pay all the moneys secured by the Charge and perform and observe all the covenants (other than those by the Chargee) (c) and conditions therein contained and keep the Vendor and his estate and effects forever indemnified against all actions proceedings expenses claims demands and liability whatsoever on account of the non-payment of the said moneys or any part thereof or the breach of the said covenants and conditions or any of them.

[5. *Certificate of value if appropriate.*] Certificate of value.

IN WITNESS etc. The Schedule Schedule.

[*Description of the property.*]

Form 13

Transfer of Registered Land subject to a Charge, the Chargee joining to Release the Vendor in Consideration of Covenants by the Purchaser (a).

(Drafted by Niul Hogg, Barrister-at-Law)

H.M. LAND REGISTRY

LAND REGISTRATION ACTS, 1925 & 1936

COUNTY or COUNTY BOROUGH:

TITLE NUMBER:

PROPERTY:

The — day of — 19—. Date.
1. IN consideration of Y pounds (£Y) the receipt whereof Receipt of purchase-money.
is hereby acknowledged I A B of etc. (hereinafter called “the Vendor”) as BENEFICIAL OWNER HEREBY TRANSFER to The Vendor.
E F of etc. (hereinafter called “the Purchaser”) the land Transfer.
comprised in the title above referred to subject to a legal charge The Purchaser.
(hereinafter called “the Charge”) of even date with but Subject to the Charge
executed and intended to be registered as a charge immediately Recital of the Charge
prior to these presents and made between myself of the one part

(a) See note (a) to the previous form.

and C D of the other part whereby I as Beneficial Owner charged the said land by way of legal mortgage with the payment to the said C D of the principal sum of £X together with interest thereon at the rate of 5 per cent. per annum as therein provided and other money by me therein covenanted to be paid (b) in respect of which principal interest and other money no payment has yet been made the full amounts thereof remaining outstanding.

Release by
the Chargee
of the
Vendor from
his covenants
in the
Charge.

2. IN consideration of the covenants by the Purchaser next hereinafter contained I the said C D of etc. (hereinafter called "the Chargee") in order to absolve the Vendor personally but not so as to prejudice my right to enforce the same against the proprietor or proprietors for the time being of the said land hereby release the Vendor from the obligation to pay all or any of the moneys whether principal interest or otherwise secured by the Charge or to perform or observe all or any of the covenants and conditions contained in or implied by the charge and from all claims and liability in respect thereof as though the Vendor had never been a party to the Charge.

Covenants
by the
Purchaser to
perform and
observe the
covenants
and con-
ditions in
the Charge.

3. IN consideration of the premises I the Purchaser hereby covenant with the Chargee that I will perform and observe all the covenants (other than those by the Chargee) (c) and conditions contained in the Charge and in particular that I will pay to the Chargee on the — day of — next the sum of £X secured by the Charge with interest thereon from the date hereof at the rate of 5 per cent. per annum And if the whole or any part of the said sum shall remain unpaid pay to the Chargee as well after as before any judgment interest at the rate aforesaid on such unpaid sum by equal half-yearly payments on the — day of — and the — day of — in every year.

Indemnity of
the Vendor
by the
Purchaser.

4. IN consideration of the premises I the Purchaser hereby covenant with the Vendor by way of indemnity only and not further or otherwise that I or my successors in title will henceforth pay all the moneys secured by the Charge and perform and observe all the covenants (other than those by the Chargee) (c)

(b) These words are inserted to cover insurance payments, etc.

(c) If the Charge does not contain any covenants by the Chargee the words in brackets should be omitted.

and conditions therein contained and keep the Vendor and his estate and effects forever indemnified against all actions proceedings expenses claims demands and liability whatsoever on account of the non-payment of the said moneys or any part thereof or the breach of the said covenants and conditions or any of them.

[5. *Certificate of value if appropriate.*]

Certificate
of value.

Signed sealed and
delivered, etc.

Form 14

Charge by Way of Legal Mortgage by an Intending Vendor of Freehold Land by the Direction of the Intending Purchaser (a).

(Drafted by *Niul Hogg, Barrister-at-Law*)

THIS LEGAL CHARGE is made the — day of — 19— Date.
BETWEEN A B of etc. (hereinafter called “the Chargor”) of Parties.
the first part; E F of etc. (hereinafter called “the Borrower”) of
the second part; and C D of etc. (hereinafter called “the
Lender”) of the third part.

WHEREAS:—

Recitals:

(i) The Chargor is [seised of the property hereinafter of seisin;
described for an estate in fee simple in possession] (b) *registered*
at H.M. Land Registry as the proprietor with an absolute
title of the property hereinafter described under Title No. —
free from incumbrances;

(ii) The Chargor has agreed with the Borrower for the sale of agreement
to him of the said property [for a like estate] for the sum of for sale;
£Y;

(iii) The Lender has agreed to lend to the Borrower the sum of agreement
of £X upon having the repayment thereof with interest as here- for loan.
inafter mentioned secured in the manner hereinafter appearing;

(a) An article by Mr. Hogg explaining the purpose of this and the two preceding forms will be found on page 390.

(b) Throughout this form where the property is unregistered the words in square brackets should be included and those in italics omitted and vice versa in the case of registered land.

Testatum.

Receipt of
money lent.

Definitions,
etc.

"The Legal
Estate."

"The
Equitable
Interest."

Covenants by
and with
the Borrower.

Covenants by
and with
the Lender.

Covenants by
the Borrower
to pay prin-
cipal and
interest.

NOW THIS DEED made in pursuance of the said agreements and in consideration of the sum of £X now paid by the Lender by the direction of the Borrower to the Chargor (the receipt whereof the Chargor hereby acknowledges and the payment whereof in the manner aforesaid the Borrower hereby acknowledges and admits) WITNESSETH as follows:—

1. IN these presents the following provisions shall have effect namely:—

(a) The expression "the Legal Estate" shall mean the legal estate in fee simple in possession of the property described in the schedule hereto whereof the Chargor is now [seised] *proprietor*;

(b) The expression "the Equitable Interest" shall mean the equitable interest in the said property arising under the before mentioned agreement for sale which is now vested in the Borrower;

(c) Covenants made by or with (c) the Borrower shall be deemed to be made on behalf or for the benefit (c) of himself and the [estate owner or estate owners] *proprietor or proprietors* for the time being of the Legal Estate other than the Chargor;

(d) Covenants made by or (d) with the Lender shall be deemed to be made on behalf or (d) for the benefit of himself his executors administrators and assigns or other the person or persons for the time being able to give a valid receipt for the moneys hereby secured.

2. THE Borrower hereby covenants with the Lender that the Borrower will pay to the Lender on the — day of — next the sum of £X with interest thereon from the date hereof at the rate of 5 per cent. per annum And if the whole or any part of the said sum shall remain unpaid after that day will so long as the same shall remain unpaid pay to the Lender as well after as before any judgment interest at the rate aforesaid on such unpaid sum by equal half-yearly payments on the — day of — and the — day of — in every year.

(c) If no covenants with the Borrower are included the words "or with" and the words "or for the benefit" should be omitted.

(d) If no covenants by the Lender are included the words "by or" and the words "on behalf or" should be omitted.

3. THE Chargor as TRUSTEE (e) by the direction of the Borrower directing as BENEFICIAL OWNER hereby charges by way of legal mortgage ALL and SINGULAR the Legal Estate with the payment to the Lender of all principal money and interest and other money (f) hereby covenanted to be paid by the Borrower.

Charge of the Legal Estate.

4. THE Borrower as BENEFICIAL OWNER hereby charges ALL and SINGULAR the Equitable Interest with the payment to the Lender of all principal money and interest and other money (f) hereby covenanted to be paid by the Borrower.

Charge of the Equitable Interest.

5. IT is hereby mutually agreed and declared that neither the Chargor nor the Borrower nor any other person shall without the previous consent in writing of the Lender exercise any of the powers of leasing or letting or of accepting surrenders conferred on mortgagors by the Law of Property Act, 1925, or otherwise.

Restriction of mortgagor's statutory powers of leasing and letting.

6. *The Chargor and the Lender hereby declare that no covenant is hereby implied to pay the principal or interest secured by the Charge (g).*

Implication of s. 28 (1) of L.R.A., 1925, negatived.

[Add other provisions as required.]

IN WITNESS etc.

The Schedule

[Description of the Property (h).]

(e) The Vendor will, as a rule, object to giving the unqualified "beneficial owner" covenants for title.

(f) The words "and other money" are inserted to cover insurance payments, etc. It is envisaged that the covenants for these will be given by the Borrower and not by the Chargor. If this is not so some alteration in the wording here may be required.

(g) This clause is inserted to negative the implied covenants by the Chargor, as being the registered proprietor of the land at the time of the creation of the charge, under s. 28 (1) of the Land Registration Act, 1925.

(h) In the case of registered land the Schedule should state that the property is registered at H. M. Land Registry with an absolute—or whatever—title under Title No. —.

Form 15

**Mutual Grants by Adjoining Owners of Rights of Way Over
Adjacent Side Passages so as to Provide Access to their
Respective Garages (a).**

Parties.

THIS DEED OF GRANT is made the — day of — 19—
BETWEEN A of etc. of the one part and B of etc. of the other part.

Recitals:

WHEREAS:—

ownership
of houses;

(1) The said A is the estate owner of the fee simple in possession free from incumbrances of the messuage Number 1 — Road in the County of — and the said B is the estate owner of the fee simple in possession free from incumbrances of the messuage Number 2 — Road aforesaid

access by
side passage
to rear;

(2) Access from — Road to the rear of the said messuage Number 1 — Road is obtained by a passage on the east side thereof shown on the plan hereto annexed and coloured red (hereinafter called the red land) and access to the rear of the said messuage No. 2 — Road is obtained by a passage on the west side thereof shown on the said plan and thereon coloured blue (hereinafter called the blue land) the red land and the blue land being divided from each other by a fence belonging to No. 2 — Road aforesaid

agreement
to grant
mutual
rights.

(3) The said A and B are desirous of erecting garages at the rear of their said messuages and for the purpose of obtaining access for motor-cars thereto have agreed to grant to each other mutual rights of passage.

NOW THIS DEED WITNESSETH and it is hereby agreed as follows:—

Grant of
right over
A's passage.

1. IN pursuance of the said agreement and in consideration of the sum of 5s. now paid by the said B to the said A (the

(a) The object of this Precedent is to enable adjoining owners, whose side entrances are too narrow for the passage of a motor-car, to use the other's side passage as well as their own, the passages being thrown into one for this purpose.

The grant by the other owner will be in a similar form. It seems preferable to have two separate deeds for a nominal consideration, rather than one deed in which the consideration is the grant by the other owner, so that each owner's title to the easement will be complete without the necessity of producing another document to prove the consideration.

receipt whereof the said A hereby acknowledges) the said A As BENEFICIAL OWNER hereby grants unto the said B

Full and free right and liberty for the said B and his successors in title owners and occupiers of the said messuage No. 2 — Road in the County of — his and their undertenants and servants in common with the said A and his successors in title owners and occupiers of the said messuage No. 1 — Road aforesaid at all times hereafter by day or by night with motor-cars and motor-cycles used for pleasure purposes only to pass and repass along and over the red land the said B and his successors in title contributing one moiety of the expense of making up the red land and keeping the same at all time in good repair and condition for the purposes aforesaid.

2. THE said B shall at his own expense remove the said boundary fence dividing the red land from the blue land and re-erect the same on the eastern boundary of the blue land and shall for ever maintain and keep in repair the same at his own expense (b). Boundary fence to be set back.

3. THE said A shall cause a memorandum of the grant hereby made to be endorsed on the conveyance to him of No. 1 — Road aforesaid. Memo to be made on A's Conveyance.

4. THE said A hereby acknowledges the right of the said B to production of a conveyance dated etc. and made between X of the one part and the said A of the other part possession whereof is retained by him and to delivery of copies thereof and hereby undertakes with the said B for the safe custody of the same. Acknowledgment for production.

IN WITNESS, etc.

(b) In B's grant A will covenant to erect and maintain a fence on the Western boundary of the red land.

Form 16

Assent by Personal Representative in Favour of a Lunatic Beneficiary where Property is subject to Restrictive or Other Covenants and Conditions and it is desired to obtain a Covenant of Indemnity from the Lunatic Beneficiary (a).

THIS ASSENT is made the — day of — BETWEEN A of etc. (hereinafter called “the Executor”) of the one part and B of [the address should not be such as to disclose mental incapacity and may be omitted altogether] (hereinafter called “the Beneficiary”) acting by C of etc. pursuant to the hereinafter recited [Authority] [Order] (hereinafter called “the Receiver”) of the other part.

WHEREAS:—

Recitals:
Appointment
of executors.

(1) X late of etc. (hereinafter called “the Testator”) died on — having by his Will dated — appointed the Executor to be the executor thereof who proved the same on — in the — Probate Registry

Seisin of
Testator.

(2) The Testator was at the date of his death seised of the property hereinafter described in fee simple in possession free from incumbrances but subject nevertheless as hereinafter mentioned

Authority
to vest
property.

(3) By an [Authority dated — issued under the Seal of the Master of the Court of Protection] [Order dated — and made in the Court of Protection] in the matter of the Beneficiary the Receiver was authorised to procure the vesting in the Beneficiary of the said property and for that purpose in the name and on behalf of the Beneficiary to execute and do such instruments acts and things as the [said Master] [Master of the said Court] should settle and approve

Approval of
Master.

(4) The said Master has settled and approved these presents as appears by his seal impressed in the margin hereof.

(a) This form has been approved by the Court of Protection. It can be adapted to other cases where it is considered necessary to make a lunatic beneficiary an executing party. An Authority to the Receiver should normally suffice, but on occasion it may be convenient to have the matter included (with other powers) in an Order.

Stamp 10s. necessary because of indemnity.

NOW THIS DEED WITNESSETH as follows :—

1. The Executor hereby as the personal representative of the Assent.
Testator ASSENTS to the vesting in the Beneficiary (the said B)
of ALL THAT [parcels] for an estate in fee simple subject to the
covenants and conditions contained or referred to in a conveyance
dated —— and made [parties]

2. With the object of affording to the Executor and to the Indemnity.
estate and effects of the Testator a full and sufficient indemnity
but not further or otherwise the Beneficiary acting by the
Receiver as aforesaid hereby covenants with the Executor that
the Beneficiary and his successors in title will henceforth observe
and perform the covenants and conditions contained or referred
to in the said conveyance dated —— and will at all times keep
indemnified the Executor and his estate and effects and the estate
and effects of the Testator from and against all actions proceedings
costs claims and demands whatsoever in respect of any breach
of the said covenants and conditions or any of them so far as
the same affect the property hereinbefore described and are still
subsisting and capable of taking effect

3. The Executor hereby :—

Declaration
of executor.

(a) declares that he has not previously hereto given or made
any assent or conveyance in respect of any legal estate in or
affecting the said property or any part thereof

(b) acknowledges the right of the Beneficiary to the produc-
tion of the probate of the said Will and to the delivery of copies
thereof.

IN WITNESS whereof the parties hereto have hereunto set
their hands and seals the day and year first before written.

SIGNED SEALED AND DELIVERED

by the said A(L.S.)

in the presence of

SIGNED SEALED AND DELIVERED
by the said B by the said C
acting as aforesaid
in the presence of

} [C should sign B's name and
then his own in the form
"B by C"](L.S.)

Form 17

Voluntary Conveyance to a Local Authority for the purpose of the Housing Acts, 1936 to 1949 and section 150 of the Act of 1936 (a).

Stamp
Ad valorem
and
adjudicated.
Parties.

THIS CONVEYANCE is made the — day of — BETWEEN THE DONOR (hereinafter called "the Grantor") of the one part and THE DISTRICT COUNCIL (hereinafter called "the Council") of the other part.

Recitals:

WHEREAS:—

1. Estate ownership and statement of solvency.

(A) The Grantor is the estate owner in respect of the fee simple of the land hereby assured in possession free from incumbrances and is solvent at the date hereof

2. Agreement for gift and statement of statutory powers.

(B) The Grantor is desirous of making a gift of the land hereby assured to the Council for the purpose of housing and the Council by virtue of the Housing Acts 1936 to 1949 and in particular of section 150 of the Housing Act 1936 has agreed and is empowered to accept a donation of the said land for the purposes of the said Acts

3. Agreement for covenants by the parties.

(C) Upon the said agreement it was stipulated that the Council should enter into the covenant hereinafter contained and that the Grantor should give the covenant and indemnity on his part as hereinafter appears

Testatum.

NOW THIS CONVEYANCE made in pursuance of the recited premises and in consideration of the covenant on the part of the Council hereinafter contained WITNESSETH as follows:—

Parcels.

1. THE Grantor as Settlor hereby conveys unto the Council ALL THAT piece of land containing an area of — acres or thereabouts situate in the Parish of — in the County of — and comprising part O.S — on the O.S. Map for the said Parish Edition of — and delineated and edged pink upon the

(a) This precedent was drafted by Mr. J. E. Holt, Solicitor of Rugby. Section 150 of the Housing Act, 1936, enacts that a local authority may accept a donation of land or other property for any of the purposes of the Act and that it shall not be necessary to enrol any assurance with respect to any such property under the Mortmain and Charitable Uses Act, 1888.

plan annexed hereto TO HOLD the same unto the Council in fee simple SUBJECT to the obligations hereinafter expressed and imposed on the Council

2. THE Grantor for himself and his representatives hereby covenants with the Council that if any duty shall become payable in respect of the land hereby assured by reason of the death of the Grantor then the personal representatives of the Grantor will immediately thereupon pay and discharge the same and will at all times hereafter keep the Council and its successors in title and the land hereby assured effectually indemnified against the same and all actions proceedings costs charges claims and demands whatsoever in respect thereof

Covenant by Grantor of indemnity against estate duty.

Habendum.

3. THE Council for the benefit of the Grantor and his adjoining land comprising the remainder of Close — hereby covenants with the Grantor that it the Council will forthwith fence off the land hereby assured on the — and — sides thereof from the said adjoining land of the Grantor with a stock proof fence to the reasonable satisfaction of the Grantor and will thereafter keep the same in repair

Council's covenant to fence, etc.

[4. Acknowledgment and undertaking for safe custody of deeds.]

[5. Certificate of value if required.]

IN WITNESS, *etc.*

Form 18

Forms Under the Landlord and Tenant Act, 1954 (a).

I

Tenant's Notice in Reply to a Landlord's Notice Proposing a Statutory Tenancy.

To —, of —, landlord of premises known as —.

1. I —, of — tenant of the above-mentioned premises hereby acknowledge receipt of your Notice dated the — day of — 19—, proposing a statutory tenancy of the premises

(a) These forms supplement the forms prescribed by the Landlord and Tenant (Notices) Regulations 1954 (S.I. 1954, No. 1107), and were drafted by E. H. Scamell, of Lincoln's Inn, Barrister-at-Law.

referred to in your said Notice and hereby give you notice that I am not willing to give up possession of the said premises or any part thereof [*or* I am willing to give up possession of the said premises] on the date specified in your said Notice.

2. (b) I agree to and accept your proposals contained in paragraph 4 of your said Notice (c) concerning the terms of the proposed statutory tenancy [except as hereinafter stated, that is to say:—

- (i) the rent should be the sum of £—— per annum payable monthly in advance;
- (ii) initial repairs should be carried out by you and at your cost in respect of ——;
- (iii) *etc.*]

3. This Notice is given under the provisions of section 4 of the Landlord and Tenant Act, 1954.

Dated this —— day of ——, 19—.

Signed.....[*Tenant*].

II

Tenant's Notice in Reply to a Landlord's Notice to Resume Possession.

To ——, of ——, landlord of premises known as ——.

1. I ——, of ——, tenant of the above-mentioned premises hereby acknowledge receipt of your Notice dated the —— day of ——, 19—, to resume possession of the premises referred to in your said Notice and hereby give you notice that I am not willing to give up possession of the said premises or any part thereof [*or* I am willing to give up possession of the said premises] on the date specified in your said Notice.

2. This Notice is given under the provisions of section 4 of the Landlord and Tenant Act, 1954.

Dated this —— day of ——, 19—.

Signed.....[*Tenant*].

(b) Omit this paragraph if the tenant is willing to give up possession.
(c) See Prescribed Form No. 1.

III

Tenant's Notice to Determine a Tenancy under section 5 (1) or section 27 (1) of the Act.

To —, of —, landlord (*d*) of premises known as —.

1. I —, of —, tenant of the above-mentioned premises holding under a tenancy granted by a Lease dated the — day of — and made between A B of the one part and C D of the other part, hereby give you notice that on the date of expiry of the term granted by the said Lease, that is to say, on the — day of —, 19—, I desire that the said tenancy shall altogether cease and determine and shall not be continued under or by virtue of any of the provisions of the Landlord and Tenant Act, 1954.

2. This Notice is given under the provisions of subsection (1) of section 5 [*or* subsection (1) of section 27] of the Landlord and Tenant Act, 1954.

Dated this — day of —, 19—(*e*).

Signed.....[*Tenant*].

IV

Tenant's Notice to Determine a Tenancy under section 5 (2) or section 27 (2) of the Act.

To —, of —, landlord (*d*) of premises known as —.

1. I —, of —, tenant of the above-mentioned premises holding under a tenancy originally created by a Lease dated the — day of — 19— and made between A B of the one part and C D of the other part and continued after the date of expiry of the term thereby created by virtue of the provisions of section 3 [*or* section 24] of the Landlord and Tenant Act, 1954, hereby

(*d*) *i.e.*, the immediate landlord.

(*e*) This Notice must be served upon the landlord at least one calendar month before the date of expiry of the term in the case of a Notice under s. 5 (1) of the Act, or, at least three calendar months before such date in the case of a Notice under s. 27 (1) of the Act.

give you notice that on the — day of —, 19— (f), the said tenancy shall altogether cease and determine.

2. This Notice is given under the provisions of subsection (2) of section 5 [*or* subsection (2) of section 27] of the Landlord and Tenant Act, 1954.

Dated this — day of —, 19—.

Signed.....[*Tenant*].

Y

Landlord's Notice to Withdraw a Notice to Resume Possession.

To —, of —, tenant of premises known as —.

1. I —, of —, landlord of the above-mentioned premises hereby give you notice that my Notice dated the — day of —, 19—, to resume possession of the above-mentioned premises [*or* part of the above-mentioned premises as therein specified] is hereby withdrawn.

2. This Notice is given under the provisions of subsection (5) of section 14 of the Landlord and Tenant Act, 1954.

Dated this — day of —, 19—.

Signed.....[*Landlord*].

VI

Landlord's Notice to Determine a Tenancy under section 24 (3) (a) of the Act.

To —, of —, tenant of premises known as —.

1. I —, of —, landlord of the above-mentioned premises hereby give you notice that on the expiration of three [*or* four *or* five *or* six] calendar months from the receipt of this Notice the tenancy under which you hold being a tenancy originally created by a Lease dated the — day of —, and made

(f) In the case of a Notice served under s. 5 (2) of the Act, this date must be at least one calendar month in advance of the date of service of the Notice, and in the case of a Notice served under s. 27 (2), must be one of the usual quarter days following the expiration of at least three calendar months from the date of service.

between A B of the one part and C D of the other part, and continued after the date of expiry of the term thereby created by virtue of the provisions of section 24 of the Landlord and Tenant Act, 1954, shall altogether cease and determine and you are required to quit and deliver up possession of the said premises on the expiration of the said period.

2. This Notice is given under the provisions of subsection (3) (a) of section 24 of the Landlord and Tenant Act, 1954.

Dated this — day of —, 19—.

Signed.....[*Landlord*].

VII

Tenant's Notice in Reply to a Landlord's Notice to Terminate a Business Tenancy.

To —, of —, landlord of premises known as —.

1. I —, of —, tenant of the above-mentioned premises hereby acknowledge receipt of your Notice dated the — day of —, 19—, to terminate my tenancy of the above-mentioned premises and hereby give you notice that I am not willing to give up possession of the said premises or any part thereof [*or I am willing to give up possession of the said premises*] on the date specified in your said Notice.

2. This Notice is given under the provisions of subsection (5) of section 25 of the Landlord and Tenant Act, 1954.

Dated this — day of —, 19—.

Signed.....[*Tenant*].

VIII

Landlord's Notices in Reply to a Tenant's Request for a New Tenancy.

(A)

To —, of —, tenant of premises known as —.

1. I —, of —, landlord of the above-mentioned premises hereby acknowledge receipt of your Request (*g*) dated the —

day of —, 19—, for a new tenancy of the property referred to in paragraph 2 of your said Request and hereby declare that I am not willing to grant you a new tenancy of the said property as requested or at all.

2. I hereby give you notice that I will oppose any application which you may make to the County Court for the grant of a new tenancy of the said property on the ground [*here state the ground or grounds (see section 30 of the Act)*].

3. This Notice is given under the provisions of subsection (6) of section 26 of the Landlord and Tenant Act, 1954.

Dated this — day of —, 19—.

Signed.....[*Landlord*].

(B)

To —, of —, tenant of premises known as —.

I —, of —, landlord of the above-mentioned premises hereby acknowledge receipt of your Request dated the — day of —, 19—, for a new tenancy of the property referred to in paragraph 2 of your said Request and hereby declare that I am willing and prepared to grant you a new tenancy of the said property upon the terms proposed by you in your said Request [subject to the following modifications, that is to say (*here set out the counter-proposals*)].

Dated this — day of —, 19—.

Signed.....[*Landlord*].

IX

Landlord's Notice of Proposed Certification under section 57 (1) of the Act.

To —, of —, tenant of premises known as —.

1. The Ministry of — [*or the — Borough Council, etc.*] landlord [*or superior landlord*] of the above-mentioned premises hereby gives you notice that the question of the giving of a certificate to the following effect is under consideration by the [*here insert the style of the appropriate Minister or Board*]

that is to say to the effect that it is requisite for the purposes of the said Ministry of — [or as the case may be] that the use [or occupation] of the said premises or a part thereof [give details] shall be changed on or before the — day of —, 19—.

2. You are hereby given notice that if within twenty-one days after receiving this notice you make representations in writing to the above-named Minister [or Board] whose address for this purpose is [give address] with respect to the giving of the above-mentioned certificate, such representations will be considered by the Minister [or Board] before determining whether to give the certificate.

3. This Notice is given under the provisions of subsection (2) of section 57 of the Landlord and Tenant Act, 1954 (h).

Dated this — day of —, 19—.

Signed.....[Landlord].

[Address].

Form 19

Clause to Enable the Lessor to Affix a Notice-Board on the Demised Premises Advertising the Sale or Lease of the Reversion or a Reversionary Lease and to Allow Prospective Purchasers or Lessees to View the Property.

It shall be lawful for the lessor (a) or his duly authorised agents for the purpose of or in connection with the sale or other disposition by the lessor of the freehold reversion or of any leasehold or other interest which the lessor has power to transfer or create in the whole or any part or parts of the demised premises at any time or times during the said term to enter upon the demised premises and to affix upon any suitable part or parts thereof a notice-board or notice-boards in connection with the

(h) This Notice may be adapted to meet the requirements of proposed certification under subss. (5) and (7) of s. 57 of the Act.

(a) There is no need for the express mention of successors: see s. 78 (1) of the Law of Property Act, 1925.

purpose aforesaid and the lessee shall not remove deface or obscure any notice-board so affixed and for the purpose aforesaid shall permit all persons bearing an order in writing under the hand of the lessor or his duly authorised agents to inspect and view the demised premises or any part thereof at all reasonable hours during the daytime without interruption.

Form 20

Conveyance by Administrator de bonis non where all the executors have died before completing administration. Variations where the deceased died intestate and the administrator has died (a).

Parties.

THIS CONVEYANCE is made the — day of — 19— BETWEEN A of etc. (hereinafter called the Vendor) of the one part and B of etc. (hereinafter called the Purchaser) of the other part.

Recitals:

death of
testator or
intestate;

WHEREAS:—

(1) X late of — in the County of — (hereinafter called the testator [Intestate]) being at his death the estate owner in respect of the fee simple in possession free from incumbrances of the freehold property hereinafter described died on the — day of — 19— having by his will dated the — day of — 19— appointed C and D to be the executors and trustees thereof who on the — day of — 19— duly proved the same in the — Probate Registry [intestate and on the — day of — 19— Letters of Administration to his estate were granted out of the — Probate Registry to C]

death of
personal
representatives;

(2) THE said C died on the — day of — 19— and the said D died intestate on the — day of — 19—. [The said

(a) The Precedent can readily be adapted to other limited grants. Under s. 2 (1) of the Administration of Estates Act, 1925, all the powers of disposition exercisable by personal representatives before the Act are to be exercisable by the personal representatives of the deceased. "Personal Representative" under s. 55 (1) (xi) includes an administrator; and under s. 1 (1) "Administration" means administration whether general or limited or with the will annexed or otherwise. As to the powers of administrators *pendente lite*, see Judicature Act, 1925, s. 163.

C died on the — day of — 19— (b) without the estate of the Testator having been fully administered or any assent in writing or otherwise having been made in regard to the said property hereinafter described]

(3) On the — day of — 19— Letters of administration *de bonis non administratis* to the estate of the Testator [Intestate] were granted out of the — Probate Registry to the Vendor grant
de bonis non;

(4) The Vendor as such personal representative as aforesaid has agreed with the Purchaser for the sale to him of the fee simple free from incumbrances of the said property hereinafter described for the sum of £Y. agreement
for sale.

NOW THIS DEED WITNESSETH as follows:—

1. In pursuance of the said agreement and in consideration of the sum of £Y on or before the execution hereof paid by the Purchaser to the Vendor as such personal representative as aforesaid (the receipt and payment whereof the Vendor hereby acknowledges) the Vendor AS PERSONAL REPRESENTATIVE of the Testator [Intestate] hereby conveys unto the Purchaser. Conveyance.

ALL THAT, *etc.*

Parcels.

To HOLD the same unto the Purchaser in fee simple.

Habendum.

2. THE Vendor hereby declares that he has not made any assent or conveyance in respect of the legal estate in the property hereby assured or any part thereof. Declaration
of no
assent.

3. [*Acknowledgment for production of grant of administration and other documents of title*] (c).

4. [*Certificate of value.*]

IN WITNESS, *etc.*

(b) A Grant of Administration *de bonis non* is required whether the administrator died testate or intestate as the office does not devolve on his personal representatives.

(c) A memo. of the Conveyance should be endorsed on the grant. The acknowledgment should include the original grant of probate or administration if it is in the Vendor's possession.

Form 21

**Declaration of Trust by Nominee in Favour of a Company of
Freeholds purchased in his Name subject to a Mortgage and
Restrictive Covenants.**

Parties.

THIS DECLARATION OF TRUST is made the — day of —
19— BETWEEN A of etc. (hereinafter called the Trustee) of the
one part and — Limited whose registered office is situate at
— in the County of — (hereinafter called the Company)
of the other part.

Recitals:

WHEREAS:—

conveyance
to Nominee;

(1) By a conveyance (hereinafter called the Conveyance)
dated the — day of — 19— and made between B of the
one part and the Trustee of the other part certain freehold
premises situate at — in the County of — therein more
particularly described were in consideration of the sum of £X
therein expressed to have been paid by the Trustee conveyed by
the said B to the Trustee in fee simple subject to the Legal
Charge (hereinafter called the Legal Charge) dated the — day
of — 19— and made BETWEEN the said B of the one part and C
of the other part whereby the said property was charged by way
of legal mortgage with the payment to the said C of the principal
sum of £Y with interest thereon at the rate of £Z per cent.
per annum and subject also to the covenants and restrictive pro-
visions contained in a Conveyance dated the — day of —
19— and made between D of the one part and E of the other
part And by the Conveyance the Trustee covenanted with the
said B to observe and perform the said covenants and conditions
and to indemnify the said B against all actions proceedings
costs claims and demands in respect thereof and in respect of
the said principal sum and interest secured by the Legal Charge.

purchase-
money paid
by Company.

(2) The said purchase-money of £X was in fact provided
by the Company out of its own moneys and the Trustee has as
from the date of the Conveyance held the said property in
trust for the Company (as he hereby admits) and for the purpose
of evidencing the said trust has agreed to execute such declara-
tion of trust as is hereinafter contained.

NOW THIS DEED WITNESSETH as follows:—

1. THE Trustee hereby declares that he holds the said property comprised in the Conveyance subject to the Legal Charge and the principal money and interest thereby secured and subject to the said Covenants and restrictive provisions IN TRUST for the Company in fee simple and to be dealt with in all respects as the Company shall direct.

Declaration of Trust.

2. IN consideration of the premises the Company hereby covenants with the Trustee that the Company will at all times keep the Trustee and his personal representatives effectually indemnified against the said principal sum of £Y secured by the Legal Charge and every part thereof and all interest now or heretofore due in respect thereof and all actions proceedings costs charges claims and demands in respect thereof and in respect of the said covenants and restrictive provisions contained in the said Conveyance dated the — day of — 19— or any of them or otherwise howsoever in relation to the said property.

Covenant of indemnity.

IN WITNESS *etc.*

Form 22

Conveyance of Freehold Property purchased in the Name of a Nominee (a).

THIS CONVEYANCE is made the — day of — 19— BETWEEN A of *etc.* (hereinafter called the Vendor) of the first part — Limited whose registered office is situate at — in the County of — (hereinafter called the Company) of the second part and B of *etc.* (hereinafter called the Purchaser) of the third part.

Parties.

(a) Under the proviso to para. 3 of Part II of the First Schedule to the Law of Property Act, 1925, added by the Law of Property (Amendment) Act, 1926, the divesting on January 1, 1926, of a legal estate vested in a nominee does not prevent the legal estate being conveyed to a purchaser without notice of the trust, provided the title deeds are produced by the nominee. Where the property was purchased after the Act, the nominee can similarly make title to a purchaser without notice of the trust. But it is sometimes desired to disclose the trust, and where there has been a formal declaration, this appears to be the correct course.

Recitals:

WHEREAS :—

conveyance
to nominee;

(1) By a Conveyance (hereinafter called the Conveyance) dated the — day of — 19— and made between C of the one part and the Vendor of the other part the property hereby assured was [with other property] in consideration of £X therein expressed to have been paid by the Vendor conveyed by the said C to the Vendor in fee simple.

payment of
purchase-
money by
Company.

(2) The said purchase-money of £X was in fact provided by the Company out of its own moneys and the said property was purchased by the Vendor as trustee for the Company [as he hereby admits] [and by a Declaration of Trust dated etc. and made between the Vendor of the one part and the Company of the other part the Vendor declared that he held the said property in Trust for the Company].

Agreement
for sale.

(3) The Vendor has with the consent of the Company agreed with the Purchaser for the sale to him for the sum of £Y of the fee simple in the same property free from incumbrances.

NOW THIS DEED WITNESSETH as follows:—

Conveyance.

1. IN pursuance of the said agreement and in consideration of the sum of £Y on or before the execution hereof paid by the Purchaser by the direction of the Company to the Vendor (the receipt and payment whereof the Vendor hereby acknowledges) the Vendor AS TRUSTEE hereby conveys and the Company as BENEFICIAL OWNER hereby conveys and confirms unto the Purchaser.

Parcels.

ALL THAT *etc.*

Habendum.

TO HOLD UNTO the Purchaser in fee simple.

[2. Acknowledgment as to documents.]

[3. Statement as to value.]

IN WITNESS *etc.*

Form 23

**Confirmatory Conveyance by Beneficiaries Ratifying a Purchase
in Breach of Trust (a)**

Drafted by Theodore B. F. Ruoff, Solicitor

THIS DEED OF CONFIRMATION made the — day of — Date.
19— BETWEEN A of etc. B of etc. and C of etc. (hereinafter Parties.
called “ the Trustees ”) of the first part D of etc. E of etc. and
F of etc. (hereinafter called “ the Original Beneficiaries ”) of
the second part H of etc. (hereinafter called “ Miss H ”) of the
third part K of etc. (hereinafter called “ Mr. K ”) of the fourth
part (the Original Beneficiaries and Miss H and Mr. K being
together hereinafter called “ the Present Beneficiaries ”) and
the said C (hereinafter called “ the Purchaser ”) of the fifth part
is SUPPLEMENTAL to a Conveyance (hereinafter called “ the Con-
veyance ”) dated the — day of — and made between the Supple-
Trustees of the one part and the Purchaser of the other part. mental to
conveyance.

WHEREAS :—

Recitals :

(1) By the Conveyance there were conveyed to the Purchaser of the
for the consideration therein mentioned certain premises known principal
as No. —, — Road, — therein more particularly described. deed ;

(2) At the date of the Conveyance the Original Beneficiaries of the
and G of etc. and Miss H were the persons and the only persons original
entitled to share in the net proceeds of sale of the property beneficial
comprised in a settlement upon trust for sale dated the — interests ;
day of — 19— of which the Trustees were the trustees which
property included the land hereby conveyed.

(3) At the date of the Conveyance Miss H was an infant of infancy
but on the — day of — 19— she attained the age of twenty- and coming
one years. of age of a
beneficiary ;

(4) The said G died on the — day of — 19— having of devolution
by his will dated the — day of — given and bequeathed of title of
all the net residue of his property to Mr. K absolutely and another
having appointed him the sole executor of his will which was beneficiary ;

(a) See an article explaining the purpose of this form and the following
one on p. 528, ante.

proved by Mr. K in the — Probate Registry on the — day of — 19— (b).

of breach
of trust;

(5) It is apprehended by the parties hereto that the Conveyance was made in breach of trust and that for that reason the Conveyance may not have been effectual to vest the land hereby conveyed in the Purchaser freed and discharged from the trusts of the before-mentioned settlement upon trust for sale.

of consent of
beneficiaries
to confirm
conveyance.

(6) The Present Beneficiaries having received independent legal advice and having satisfied themselves that the transaction which was evidenced by the Conveyance was a fair and proper one in every respect and that the consideration paid by the Purchaser was adequate have resolved to confirm the Conveyance.

Testatum.

NOW THIS DEED WITNESSETH that the Trustees AS TRUSTEES with the consent of the Present Beneficiaries hereby convey and confirm unto the Purchaser and the Present Beneficiaries and each of them as BENEFICIAL OWNER hereby conveys and confirms unto the Purchaser ALL such estate rights and interests as they or any of them may have or retain in the land comprised in the Conveyance TO HOLD unto the Purchaser absolutely to the intent that the land comprised in the Conveyance shall vest in the Purchaser in fee simple absolutely freed and discharged from all trusts powers and provisions contained in the above-mentioned settlement upon trust for sale.

Conveyance.

Habendum.

[Add any other requisite provisions, such as a covenant by way of indemnity to observe and perform existing restrictive covenants (c).]

Certificate
of value.

[Certificate of value if appropriate.]

IN WITNESS, etc.

(b) If the breach of trust is discovered soon after it was committed, the task of curing the defect in title will be simplified and, for example, the need to prove such facts as those appearing in the fourth recital will be avoided.

(c) If restrictive covenants were imposed on the purchaser by the conveyance now being confirmed, the covenants ought to be entered into afresh in the confirmatory deed just as if they were original covenants.

Form 24

Statutory Declaration Proving the Recitals in a Confirmatory Conveyance to Ratify a Purchase in Breach of Trust (d)

Drafted by Theodore B. F. Ruoff, Solicitor

WE D of etc. E of etc. F of etc. H of etc. and K of etc. Declaration.
do solemnly and sincerely declare as follows:—

AND FIRST I, the said H, for myself declare:—

1. THAT I have always understood that I was born on the — day of — 19— and I believe that I am the person who is described in the accompanying certified copy of an entry of birth now produced and shown to me and marked “H.1.”

As to birth of one beneficiary.

AND NEXT I, the said K, for myself declare:—

2. THAT [my brother] G late of etc. died on the — day of — 19— having by his will dated the — day of — given devised and bequeathed all the net residue of his real and personal property whatsoever and wheresoever to me absolutely and having appointed me the sole executor of his said will which I proved in the — Probate Registry on the — day of — 19— as is evidenced by the photostat copy grant with a photostat copy of the will annexed thereto now produced and shown to me and marked “K.1.”

As to devolution of another beneficiary's title.

AND NEXT each of us, the said D, E, F, H and K, for ourselves declare:—

3. AT THE date of the Conveyance mentioned in clause 6 hereof the said D, E, F and H and [our brother] the said G were the persons and the only persons entitled to share in the net proceeds of sale of the property comprised in a settlement upon trust for sale dated the — day of — which comprised (inter alia) the property described in clause 6 hereof of which settlement A of etc. B of etc. and C of etc. (hereinafter called “the Trustees”) were the trustees.

As to beneficial ownership at date of breach.

4. WE ARE the only persons now entitled to share in the net proceeds of sale arising under the settlement upon trust for sale referred to in the preceding clause and we have not nor

As to present beneficial ownership;

(d) See the last form and also the explanatory article on p. 528, *ante*. Separate declarations may, of course, be made by the several declarants if more convenient.

and free
from incum-
brances.

has any one of us at any time sold mortgaged charged encumbered or otherwise dealt with or agreed to deal with or dispose of any present or future interest in the property at any time beneficially held or enjoyed by us under the said settlement upon trust for sale.

Beneficiaries
sui juris.

5. WE ARE all of sound mind and over the age of twenty-one years and none of us has ever been adjudicated a bankrupt nor has a bankruptcy petition been presented against any of us.

Conveyance
in breach
of trust.

6. By a Conveyance dated the — day of — 19— and made between etc. in consideration of £— the Trustees conveyed to the said C certain premises known as No. —, — Road, — therein more particularly described.

AND NEXT I, the said F, for myself declare:—

Beneficiary
independ-
ently
advised;

7. THAT I have consulted and I have been advised independently by Messrs. XY & Co. of — Solicitors, who do not act and have never acted as solicitors for the Trustees or for the said C as to the nature and propriety of the transaction effected by the Conveyance referred to in clause 6 hereof and having received their advice and fully understanding that the validity of the said Conveyance may depend upon my giving or withholding my consent to the transaction I give my unequivocal approval thereto and hereby put on record my willingness formally to confirm the same.

and
consenting.

AND FINALLY we, the said D, E, H and K, for ourselves declare:—

Other
beneficiaries
independ-
ently
advised;

8. THAT we have consulted and have been advised independently by Messrs. PQ & Co. of — Solicitors, who do not act and have never acted as solicitors for the Trustees or for the said C as to the nature and propriety of the transaction effected by the Conveyance referred to in clause 6 hereof and having received their advice and fully understanding that the validity of the said Conveyance may depend upon our giving or withholding our consent to the transaction we and each one of us give our unequivocal approval thereto and hereby put on record our willingness formally to confirm the same.

and
consenting.

AND we make, etc.

DECLARED, etc.

Form 25

Preliminary Inquiries or Requisitions under the Landlord and Tenant Act, 1954.

Drafted by E. H. Bodkin, of Lincoln's Inn

Residential Tenancies.

1. (1) Are any of the tenancies tenancies (whether or not continued by Part I of the Leasehold Property (Temporary Provisions) Act 1951 as extended) to which Part I of the Landlord and Tenant Act 1954 applies or will or may apply (whether in regard to the whole or part of the demised premises) and have any of them been continued by the latter Act? (a)

(2) If so (i) has the landlord served a notice proposing a statutory tenancy or a notice to resume possession (b); (ii) has the tenant given notice to determine the tenancy or that he elects to retain possession (c); (iii) have the terms of the statutory tenancy and the premises to which it relates been agreed or determined by the court; and do such terms include any

(a) Part I of the Act applies to tenancies for a term certain exceeding 21 years at a rent less than two-thirds of the rateable value under the appropriate Rent Restriction Act (including tenancies which are continued by the Leasehold Property (Temporary Provisions) Act, 1951, and the Leasehold Property Act and Long Leases (Scotland) Act Extension Act, 1953, until December 24, 1954), which would (apart from the rent being a low rent) have been protected by the Rent Restrictions Acts. A sub-tenant in possession may be protected when the tenancy comes to an end; s. 15. Application can be made to the court to determine whether a tenancy falls within the Act. The tenancy continues after its effluxion until notice is given by either party in accordance with the Act; s. 3. On the landlord giving a "notice proposing a statutory tenancy" the Rent Acts apply for the protection of the tenant. Inquiries may be necessary not only in regard to tenancies which have not expired but also as to those which are continued by the Act after the term has run out. But those in (2) are only needed when the original term has expired, or will expire within 12 months, as the landlord cannot give a notice under the Act earlier.

(b) Under s. 4 the landlord's notice must either contain proposals for a statutory tenancy or state that if the tenant is not willing to give up possession the landlord proposes to apply to the court for an order for possession. As to the consent of other landlords, see note (d).

(c) See ss. 4 (5), 5.

initial repairs or payment by the tenant for accrued repairs (*d*); (iv) has any record of the state of repair been made (*e*); and (v) has the consent of every superior or mesne landlord affected thereby to any such notice or agreement as aforesaid been obtained? (*f*)

2. Has the Vendor notice of any claim for compensation for improvements under the Landlord and Tenant Act 1927 (as amended)? (*g*)

Shops and Business Premises.

1. (1) Has the tenant any right, or may he have the right on termination of his tenancy, to a new tenancy of the whole or any and what part of the premises or to compensation under Part II of the Landlord and Tenant Act 1954 or section 4 of the Landlord and Tenant Act 1927? (*h*)

(2) In particular has he any such right by reason of any beneficiary under a trust of which he is a trustee carrying on business on the demised premises? (*i*)

(3) If so (*i*) has the Vendor given notice to terminate the

(*d*) The terms of the statutory tenancy must include the rent and the liability of landlord or tenant for initial repairs and any payment to be made by the tenant for accrued repairs—s. 7.

The consent of all superior and mesne landlords affected by a notice or agreement by the competent landlord must be applied for, otherwise he may have to pay compensation to them, though the agreement or notice will bind their interests—Sched. 5.

(*e*) See Second Sched. 7-11.

(*f*) See Sched. 2, para. 7.

(*g*) Claims must now generally be made not later than three months before determination of the tenancy by notice or otherwise—s. 47. Compensation can now be obtained for improvements executed in pursuance of a statutory obligation—s. 48.

(*h*) A tenant who uses the premises or part thereof for his trade, profession or employment (including a body of persons, whether corporate or unincorporate, carrying on any activity there) is entitled under Part II on the termination of his tenancy by notice or effluxion of time to a new tenancy of the whole or the part so occupied. After the existing tenancy has run out it is continued by the Act, as in regard to residential premises, until terminated by a notice under the Act—s. 24. The Act does not apply to a tenancy for 3 months or less, unless the tenant (and his predecessors) have been in occupation for more than 6 months—s. 43 (3).

An application for compensation under the Landlord and Tenant Act, 1927, commenced before the Act is saved by Sched. 9, para. 9.

(*i*) See s. 41.

tenancy; (ii) has the tenant made any request or application to the court for a new lease or given notice that he does not desire the tenancy to be continued (*j*); (iii) has any agreement been made between the landlord and tenant for a new lease and, if so, has the consent of all superior and mesne landlords affected thereby been obtained? (*k*)

(4) Has the tenancy been continued under Part II of the Act? (*l*)

Form 26

Preliminary Inquiries or Requisitions under the Housing Repairs and Rents Act, 1954.

Drafted by E. H. Bodkin, of Lincoln's Inn

1. What is (i) the gross rateable value of the premises and (ii) the amount of the rates (if any) payable by the landlord; the part (if any) of the rent agreed, or determined by the Tribunal, to represent payment for furniture or services; and any increases of rent recoverable in respect of improvements, structural alterations, fixtures and fittings? (*a*)

2. (1) Is the state of repair and suitability for occupation such as to justify a repairs increase? (*b*)

(*j*) See s. 25 as to termination by the landlord of the tenancy (whether or not continued by the Act) and the tenant's consequent right to apply to the court for a new tenancy. The tenant can under s. 26 in certain cases make a request for a new tenancy, or, not later than three months from the date when it would expire by effluxion of time, serve a notice that he does not desire the tenancy to continue, in which case his right to apply to the court for a new lease is lost. The inquiries in (3) are not needed unless the original term has expired, or will expire or can be determined by notice within 12 months.

(*k*) See Sched. 6.

(*l*) The tenancy will continue after the term has run out until terminated in accordance with the Act—s. 24.

(*a*) Where the repairs increase would bring the rent recoverable from the tenant (after deducting the amounts in (ii)) up to twice the gross value, no repairs increase can be made; in other cases it will be reduced so as not to bring the recoverable rent after the above deductions above twice the gross value—s. 24.

(*b*) The premises must under s. 23 (1) be in good repair and reasonably suitable for occupation in regard to the matters referred to in that section.

(2) Has any certificate been given by a sanitary or local authority and is it still in force? (c)

3. Have any repairs been done (whether before or after the Act) which render a repairs increase payable? (d)

4. Has any notice of increase been served on the tenant; and, if so, has he applied to the court to determine whether it is effective? (e)

5. (1) Has any agreement or order fixing the proportion of the landlord's liability for repairs been made? (f)

(2) Has the landlord served a notice that subsection 3 of section thirty shall apply? (g)

[6. Has any agreement in writing for an increase of rent in respect of a rise in the cost of services been made, or has the Tribunal determined that the landlord should be allowed any increase therefor? (h)]

(c) The local authority can give a certificate under s. 26 that either or both the conditions justifying an increase of rent are not fulfilled. A certificate of a sanitary authority given before the Act operates as a certificate that neither condition for an increase of rent is satisfied—s. 27 (2).

(d) Work of repair falling within a specified period of 12 months within the 14 months preceding service of the notice, or, when the notice is served within four months after the Act, within a period of three years within the preceding four years, will qualify—Sched. 2, paras. 1, 2.

(e) The court can declare the notice of no effect on the ground that the requisite repairs have not been done—Sched. 2, para. 4.

(f) The extent to which the landlord is to be deemed to be liable for repairs (on which the amount of work required to be done and the amount of the repairs increase depends) is specified in s. 30. Under s. 23 (5) any question as to the proportion is to be agreed between landlord and tenant or in default to be fixed by the court.

(g) The effect of such a notice (which can only be served when neither landlord nor tenant is expressly liable for internal decorative repairs) is that the state of internal decorative repair is to be disregarded (unless such as to render the premises not reasonably suitable for occupation); but both the repairs increase and the work necessary to claim it will be reduced by a third.

(h) Such an agreement is effective as regards pre-1939 houses and binds a contractual or statutory tenant; the tribunal has power to allow an increase if in all the circumstances it is just—s. 40.

This and the next requisition would be covered by the usual inquiry as to the standard rents.

[7. Has the local authority fixed a standard or maximum rent for the premises? (i)]

Form 27

Conveyance of Freehold Land to a Purchaser Subject to Restrictive Covenants with the Assistance of an Advance, the Vendor first Granting a Mortgage Term to the Lender and subsequently Conveying the Equity of Redemption to the Purchaser (a).

THIS CONVEYANCE is made the — day of — 19— BETWEEN Parties
A of etc. (hereinafter called “the Vendor”) of the first part

(i) The local authority has power to fix the standard rent when it parts with the property—s. 34. When an improvement grant is made, it fixes a maximum rent which becomes the standard rent—s. 37.

(a) Stamp *ad valorem*. This form is intended to meet the difficulty resulting from the decision of the Court of Appeal in *Church of England Building Society v. Piskor* [1954] Ch. 553. It must be regarded as established by that authority that if a purchaser finances a purchase of land by a loan and takes a conveyance, immediately thereafter mortgaging the property to secure the advance, the conveyance and mortgage are two transactions and not one. The view of Harman J. in *Coventry Permanent Economic Building Society v. Jones* [1951] 1 All E.R. 901 that a mortgage and conveyance can, in certain circumstances, be regarded as one transaction is not well-founded. It follows that there is a scintilla temporis between the conveyance and the mortgage, and if the purchaser has before completion taken possession of the property and purported to grant a tenancy of the whole or part of it, the estoppel which was involved in the creation of such tenancies would be fed by the legal estate in the purchaser, with the result that such a tenancy would take priority to the mortgage. Accordingly, should the mortgagee ever want to enforce his security he will be faced with a legal tenant entitled to the protection of the Rent Restriction Acts: see *Woolwich Equitable Building Society v. Marshall* [1952] Ch. 1; *Universal Permanent Building Society v. Cooke* [1952] Ch. 95.

A mortgagee can protect himself against the risk of such tenancies by a rigorous inspection of the property immediately before completion. If that method of procedure is impracticable, it would seem that, if the transaction is effected by a mortgage and conveyance in one document, the purchaser granting first a mortgage term to the mortgagee, who has advanced part of the purchase-money on the security of the property, and then conveying the equity of redemption to the purchaser, there can be no scintilla temporis during which the purchaser will have a legal estate having priority to that of the mortgagee which could enure for the benefit of the persons to whom he had granted tenancies. Where the transaction is effected by one document in this way, the purchaser will never have a legal estate having priority to that of a mortgagee, whose title will be derived directly from the vendor. The above form is an alternative

B of etc. (hereinafter called "the Purchaser") of the second part and C of etc. (hereinafter called "the Mortgagee") of the third part.

Recitals:

WHEREAS:—

title of
vendor and
agreement
for sale;

(1) The Vendor is the estate owner for his own absolute use and benefit in respect of the fee simple of the property hereby assured and has agreed to sell and transfer the said property to the Purchaser subject as hereinafter mentioned but otherwise free from incumbrances for the sum of £X

agreement
for loan;

(2) The Mortgagee has agreed with the Purchaser to lend to him the sum of £Y to enable him to complete the purchase of the said property from the Vendor upon having the repayment thereof with interest thereon at the rate hereinafter mentioned secured in manner hereinafter appearing

provision as
to mortgage
term.

(3) The Vendor at the request of the Purchaser has agreed to grant a term of years to the Mortgagee to secure the said moneys so advanced to the Purchaser as aforesaid.

NOW THIS DEED WITNESSETH in pursuance of the said agreement as follows:

Mortgage
term.

1. The Vendor in consideration of the sum of £Y now paid by the Mortgagee to the Vendor by the direction of the Purchaser (the receipt and payment whereof the Vendor and the Purchaser hereby respectively acknowledge) the Vendor as BENEFICIAL OWNER at the direction of the Purchaser HEREBY DEMISES unto the Mortgagee ALL THAT piece or parcel of land situate at — in the county of — together with the dwelling-house erected thereon known as — which premises are more particularly described in the first Schedule hereto and are delineated on the plan annexed hereto and thereon coloured pink To HOLD the same unto the Mortgagee for the term of 1,000 years from the date hereof without impeachment of waste subject to the restrictive covenants specified in the second Schedule hereto and to the provision for redemption hereinafter contained PROVIDED ALWAYS that if the Purchaser shall on the — day of — next pay to the Mortgagee the said sum of

method of meeting this problem to that effected by the forms *ante* (p. 691), based on Mr. Hogg's article *ante*, p. 390.

£Y with interest thereon in the meantime at the rate of £—— per cent. per annum then and in such case the said term hereby granted shall absolutely cease and determine and become merged in the reversion immediately expectant thereon.

2. In consideration of the sum of £X - £Y (being the balance of the said sum of £X now paid) by the Purchaser to the Vendor (the receipt whereof the Vendor hereby acknowledges) the Vendor as BENEFICIAL OWNER hereby conveys unto the Purchaser ALL THAT said piece or parcel of land more particularly described in the said first Schedule hereto To HOLD the same unto the Purchaser in fee simple subject to the obligations and restrictive provisions (b) hereinafter expressed and to the said term of 1,000 years hereinbefore demised to the Mortgagee and to the principal moneys and interest thereby secured.

Conveyance of the equity of redemption.

3. The Purchaser to the intent and so as to bind (so far as practicable) the land and premises hereby assured into whose-soever hands the same may come and to benefit and protect the adjoining property of the Vendor coloured green on the said plan and every part thereof but not so as to render the Purchaser personally liable in damages for any breach of covenant committed after he shall have parted with all interest in the premises in respect of which such breach shall occur HEREBY COVENANTS with the Vendor that he will observe and perform the several covenants stipulations and provisions contained in the second Schedule hereto.

Purchaser's covenants to observe restrictions.

4. In consideration of the sum of £Y paid to the Vendor by the direction of the Purchaser by the Mortgagee the Purchaser hereby covenants with the Mortgagee to pay to the Mortgagee on the —— day of —— next the said sum of £Y

Purchaser's covenants with mortgagee to repay principal.

(b) If the vendor desires to impose restrictive covenants on the property the mortgage term must be expressed to be subject to the restrictions thereafter imposed. The vendor should register a priority notice under the Law of Property (Amendment) Act, 1926, s. 4 (1), in respect of the restrictions both against the mortgagee and the purchaser: Should the restrictions not be registered as a land charge Class D (ii) against the mortgagee, since his mortgage term derives from the vendor and not the purchaser, should the mortgagee exercise his statutory power of sale a purchaser from him would take free from the restrictions.

with interest thereon in the meantime at the rate of £—— per cent. per annum from the date of this deed and further if the said moneys shall not be so paid to pay to the Mortgagee interest at the rate aforesaid by equal quarterly payments on the —— day of —— etc. specified days for payment in every year on the principal moneys for the time being remaining due on this security.

Purchaser's
covenants
with mort-
gagee.

5. The Purchaser hereby covenants with the Mortgagee and it is hereby agreed and declared as follows:

[Here add the usual covenants by a mortgagor to repair and insure and against change of user and any other covenants the Mortgagee requires including the usual restriction on the exercise of a mortgagee's powers of leasing.]

6. *[Insert the usual acknowledgment and undertaking as to documents.]*

7. *[Add statement as to value if required.]*

IN WITNESS.

THE FIRST SCHEDULE

[To contain a full description of the property.]

THE SECOND SCHEDULE

[To contain the restrictive covenants provisions which the Purchaser has covenanted to observe.]

THE THIRD SCHEDULE

[To contain particulars of the documents acknowledged.]

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